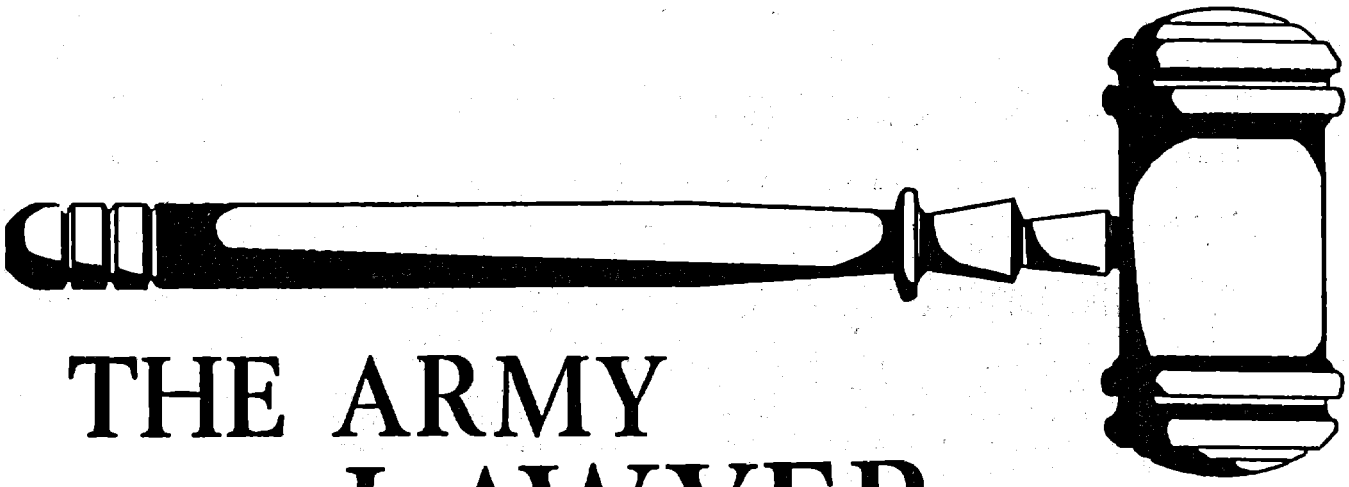

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27–50–189

September 1988

Table of Contents

The Army Lawyer (ISSN 0364–1287)

Editor
Captain Matthew E. Winter

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, WordPerfect, MultiMate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and *Military Citation* (TJAGSA, July 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903–1781.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON DC 20310-2200

REPLY TO
ATTENTION OF

JAGS-GRA

11 July 1988

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES AND SENIOR LEGAL COUNSEL

SUBJECT: Recruiting Legal Specialists and Court Reporters for the Reserve Components - Policy Letter 88-4

1. Legal specialists and court reporters are essential to the accomplishment of active duty and Reserve Component (RC) legal missions. Many RC unit and Individual Mobilization Augmentee (IMA) positions remain vacant. Ideal candidates for RC positions are legal specialists and court reporters who are leaving active duty. These soldiers have the training, experience, and ability to be valuable RC assets. We must intensify our efforts to recruit them as active participants in the Army National Guard and Army Reserve.

2. Retention of the transitioning soldier in the RC consists of two steps: first, encouraging the soldier to participate; second, finding a vacancy which meets the soldier's needs. To ensure that qualified soldiers are being recruited for the RC, the first NCO supervisor in JAGC technical channels will have the soldier counseled by the unit Reenlistment NCO as required by AR 601-280, but in any event not later than 90 days prior to expiration term of service (ETS). The NCO supervisor will attend this meeting. If the soldier decides not to reenlist, he or she must be scheduled for counseling by the in-service recruiter. This counseling will be done not later than 60 days prior to ETS. The first NCO supervisor in the soldier's technical channel and the Installation/Division Chief Legal NCO should attend the counseling session with the soldier. If the soldier wants to continue a career in the RC and the recruiter is unable to locate a 71D or 71E unit vacancy in the soldier's home area, the Chief Legal NCO will contact the CONUSA SJA SGM for assistance not later than 45 days prior to ETS. The CONUSA SGM will attempt to locate a 71D or 71E unit vacancy in the soldier's hometown area. If the CONUSA SGM is unable to find a position for the soldier, notification will be made to the soldier's Chief Legal NCO so that the soldier may be assigned to an IMA position (E-6 and above), or recruited to another MOS. For IMA assignments, the Chief Legal NCO may contact the Enlisted Career Advisor at ARPERCEN (800-325-4752; (314) 263-7343).

3. This supersedes TJAG Policy Letter 86-5, 18 March 1986.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

12th Charles L. Decker Lecture
The Military Officer and the Constitution

Strom Thurmond
United States Senator

The Charles L. Decker Chair of Administrative and Civil Law was established on May 11, 1977, in honor of Major General Charles L. Decker.

Born in Kansas in 1906, General Decker attended the University of Kansas and completed his studies at West Point in 1931. He received his law degree in 1942 from Georgetown University and received advanced law degrees from St. Edward's University and John Marshall Law School.

General Decker served as a judge advocate at all levels of command. He was the Staff Judge Advocate of XIII Corps throughout its campaigns in Western Europe. He was also instrumental in founding The Judge Advocate General's School in Charlottesville and served as its first Commandant. Major General Decker recognized the importance of administrative and civil law, and, as Commandant, was instrumental in developing a separate administrative and civil law teaching division at the School.

General Decker retired from active duty in 1963, having served as The Judge Advocate General of the Army since 1961.

The Judge Advocate General's School was especially fortunate to have the Honorable Strom Thurmond, distinguished Senator from South Carolina, present this year's lecture.

What is the Constitution? I believe it to be the greatest plan for government ever devised. The Englishman, William Gladstone, said at its centennial, "The American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man." We have now reached the bicentennial of this mighty document, and after 200 years it remains an eminently workable method of organizing a government. It is not without its flaws or its detractors, but, in the main, it has weathered the storms of two centuries of life in this nation. As Hubert Humphrey said, "The Constitutional system, as developed in America, has both the flexibility and the durability to meet and master every challenge." Now Senator Humphrey and I did not always agree, but we certainly agree on that.

So one of my messages to you is to be happy that we live in a country whose founders had such a brilliant, yet practical vision. My other message is that you should take pride in your connection to our Constitution because it is unique. As soldiers, sailors, and marines, your relationship to our Constitution is shared by few in our nation—for you swear an oath to "support and defend the Constitution of the United States from all enemies, foreign and domestic . . ." and to "bear true faith and allegiance to the same. . . ."

The link between America's soldiers and America's freedom has existed since the first days of the republic. 210 years ago, General Washington brought his small Continental Army to Valley Forge. During that winter, those 11,000 men suffered hardships that are almost unimaginable. General Washington wrote on 23 December 1777, "We have this day no less than 2,873 men in camp unfit for duty because they are barefooted and otherwise naked. . . . Numbers are obliged to sit all night by the fires. . . ." Despite the almost overwhelming difficulties they endured, and in spite of the odds they faced in their battle against the British Army, those soldiers did not quit. They stood by General Washington and under his leadership they secured our independence.

That leadership was severely tested at the end of the war when victory over the British was assured, but the course our nation would take was still undetermined. In 1783, the Continental Congress stopped paying the Army and there was a serious possibility of a mutiny. General Washington was encamped in Newburgh, New York, and some of his officers were circulating petitions urging the Army to march on Congress and force the restoration of back pay. Upon learning of these events, General Washington called his officers together and convinced them of the error of their ways. The crisis was averted, the Army remained loyal, and stability was assured.

Of course when the fighting was over, the contributions of our military did not stop. Out of the fifty-five delegates to the Constitutional Convention, no less than eighteen were former continental officers. Thirty-four of the delegates practiced law, so, no matter how you slice it, today's JAG officers were well represented. And what happened during that long, hot summer of 1787? Those former soldiers and their compatriots shut themselves off from the rest of the country and wrestled with each other until they produced a document that only thirty-nine of them were willing to sign at the time. But those fifty-five men, representing a nation of three million people, had produced a constitution that 200 years later would govern a nation of over 250 million people. What a grand result. As a United States Senator, not a day goes by where I do not take some action that was contemplated and planned for by those men. For example, the Constitution gives the President the power to appoint Justices to the Supreme Court, with the "advice and consent" of the Senate. We recently went through several rounds of that process, in order to confirm a nominee to fill the seat of Mr. Justice Powell.

Back in 1787, molding the thirteen separate colonies into one nation under a central government was not an easy job. One of the most difficult issues the founders faced was that of arranging for our military forces. As set out in the Preamble to the Constitution, one of its great purposes was to "provide for the common defense." But how? Many of the delegates wanted to answer that question through the use of the various state militias—there was a fear that a standing Army would be a threat to, and not a guardian of, liberty. But those who saw beyond the thirteen colonies—who glimpsed what potential lay in the West and understood the

dangers from foreign powers that still faced our country—knew that America could not rely on state militias for her only defense.

A compromise was reached. A compromise that would allow for a standing Army, but which limited appropriations of money to support the Army to be for no longer than a term of two years. Interestingly, there was no similar concern as to the problem of a standing Navy and there is no constitutional limit on the term of appropriations for our sea services.

Of course we are still living with the results of that compromise and each year you probably watch in wonder as the process runs its course. You may have said to yourself as the end of the fiscal year approached, "Why can't Congress get the appropriations and authorizations bills out on time?" We do try hard, but one reason it takes us so long is that those bills are like a slow moving freight train, and as they move along, more and more legislation is loaded onto them. A lot of it is pretty important—for example, the JAG School LL.M. Sometimes the riders do seem to be a bit distant from the concerns of defense. Some of my personal favorites have been the nine digit zip code, the fight against the asparagus aphid, and money for split pea research. But let's get back to the Constitution.

The question of civilian control over the military was the central feature of the Constitution with respect to the nation's military forces. George Washington was a strong supporter of the idea and, if I may, I would point out that the delegate who presented the plan eventually adopted was a fellow South Carolinian—Charles Pinckney. They conceived of the military as an agency of civil power, to be organized and disciplined with that purpose in view.

Pinckney's plan and, as a result, the Constitution, placed the control of the military in the hands of both the executive and the legislative branches. The President is the Commander in Chief, but the power of the purse and the power to declare war rest with Congress. Thus, the military is subject to the direction of both branches, a situation which although absolutely necessary, can be at times absolutely difficult.

As you know, there is a major difference of opinion concerning who should determine whether to introduce U.S. forces abroad into hostilities, or into situations where hostilities are clearly imminent. This has been a hot topic of debate since the Vietnam War and has again come to the fore in American politics. Is it to be the Congress, or the Executive? This difference is reflected in the amount of controversy surrounding the War Powers Resolution, and recently, its application to the situation in the Persian Gulf.

Military officers are rightfully concerned about the current dispute over civil prerogatives that stem from the bifurcation of civilian control over the military. I can, however, assure you that irrespective of who exercises principal control over the use of force abroad, both the Congress and the Executive are committed to a strong defense and effective military forces.

Up to this point, I have been discussing the Constitution as planned. That is what the document is—a plan, a road map for our nation and our government. Like any plan or any map, however, it is of no use unless it is followed. It cannot help us unless it has our support. I believe that some of the most important support the Constitution has in this country comes from our military, especially its officer corps. I think that this support is manifested in four important relationships that link our officers and our Constitution. I'd like to talk about each of them in turn. They have been a constant in the life of this republic since its birth and, God willing, they will remain so.

No other member of our society has quite the same relationship with the Constitution as the military officer. The officer is first, and always, a citizen. Secondly, the officer is a leader who is both empowered and constrained by the Constitution. Third, the officer is a supporter of the Constitution, and takes an oath to that effect. Finally, the officer is a defender of the Constitution, ready to protect it by force of arms if directed.

Let me talk first about citizenship—a duty and a privilege that form the foundation of our officers' ties to the Constitution. What of their duties of citizenship? They have to first be informed about the business of the nation. They cannot withdraw into a shell and limit their perspective to purely military concerns—a good officer watches and wonders about the direction of the nation, and stays informed about it.

But information by itself does not make a citizen. Officers must be concerned with and care about where we are going as a country. Only in that way can they be truly prepared to do the best they can for their own services and to provide timely and valuable input to the Congress and the President.

Officers can meet their responsibilities in this area through their forthright and thoughtful participation in the development of policy, and I will address that in more detail later. There is a far simpler and more elementary method for them to acquit themselves as citizens. I am speaking of voting. As you might imagine, I believe it to be the cornerstone of citizenship. I urge you to use your vote. Often, due to the transitory nature of your duties, you won't be concerned with local politics, but don't let that stop you from taking the time to register and vote in our national elections. Use an absentee ballot when necessary. Just vote.

Along with the duties of citizenship, come its benefits. Principally they are the freedoms we enjoy in our daily lives, and the promise that those freedoms will be there for our children. If the Constitution is nothing else, it is a testimony to hope and the faith that we can and will survive as a free nation. I know that, as soldiers, you sacrifice some of the personal freedoms taken for granted by your fellow Americans. There are areas, such as speech, where because of your status as an officer, you must live under constraints not present for the average American. You are not average Americans, however, and I salute you for the discipline you accept in the interest of the greater goals you pursue.

Military officers aren't just citizens, they are leaders. It is important to note that you, unlike many of your counterparts in other nations, serve the people through the Constitution. You do not serve whatever ruling elite is currently in power. What do the people of our country entrust to you? They commit their sons and daughters to your direction and consequently to your care. As a Senator, and a member of the Armed Services Committee, I play a role in bringing those young men and women to you. In looking at the officer corps of our armed services, I take comfort in the

knowledge that we are delivering them into the hands of competent and responsible leaders.

I mentioned earlier my understanding of the sacrifice you make in the area of certain limitations on your right to free speech and the like. You accept those constraints because you realize that they are required in the interests of military discipline. I charge you to ensure that a proper balance is maintained between the constitutional freedoms of the members of our Armed Forces and the needs of discipline. Let only those restrictions that are necessary be imposed. Striking that balance is part of the leadership challenge inherent in the duties of the American military officer.

As American military officers, you are more than just citizens and leaders under the Constitution. You are supporters of it—and your support is critical.

Look at the world today. I must admit that I get tired of keeping track of the unscheduled changes in government that go on out there beyond our shores. Everybody has a constitution. And, in some countries, if they don't, you can be sure they'll get some form of one after the next coup. These countries all have a military too. What is it that we have that they don't? I think the difference is that our military takes an oath to support and defend the Constitution of the United States. You don't swear allegiance to a leader, or a political party, or even to a country—instead you stand behind the form of government established by our founding fathers. Throughout our history you have kept your oath.

That is the critical difference that has allowed the precept of civilian control, and with it political stability, to endure in this country. Your true faith and allegiance is pledged to this great document—and the very fact of your loyalty strengthens and secures the Constitution's place in our national life.

We have a military with commitment, loyalty, and vision. A commitment to serve the nation. A loyalty that channels that commitment in a direction that preserves our liberties, and a vision that keeps that loyalty strong, through good times and bad. Because we have such a military, your fellow Americans can go about their business, secure in the knowledge that they need not look over their shoulders to see what the Army is up to. This fall, we will have an election that will change some of the faces in our government. We shouldn't forget how blessed we are that the change in governments in our country comes as a result of the votes of her citizens—not every nation is so lucky. We even had to borrow the expression, "coup d'etat" from a foreign language.

We've seen so far that you are citizens and leaders under, and supporters of, the Constitution. There are others who also meet these criteria but they are not called upon to be prepared to give their lives in its defense. That role is your most sacred link to the document. Others may support it, and even defend it in the courts or the legislatures—but in you is placed the final trust of the people for the protection of the Constitution. We have our enemies in this world, and our Armed Forces have earned the confidence of the nation. The stone markers in our many military cemeteries, at home and overseas, silently remind us of the price of freedom.

You have always been ready and I pray that you always will. We in Congress provide you with money, weapons, and troops—only you can fashion those elements into a fighting force that is capable of defending the nation and deterring those who would attack us. On that subject, I am heartened by the candor and honesty I see at the highest levels of the military. I said that we give you the tools, but they will only be adequate when your military leaders are honest and open in their appearances before our committees. I believe that the communication between us is the best it has ever been, and as a legislator, I appreciate it.

All of this brings me to a discussion of the role of the JAG Corps in these processes. It is a role that will continue to grow in importance. As officers, you maintain each of the four relationships to the Constitution that I just discussed, but you are unique within the profession of arms. You are, of course, attorneys—lawyers who represent their clients in and out of the courts of law. You have a long history of helping soldiers and ensuring that no one encroaches on their individual rights. Your criminal justice system is a model. I wish that the civilian law enforcement system could do as much for the accused, while at the same time protecting the larger interests of society. We saw what I believe to be an affirmation of your justice system in the *Solorio* decision handed down by the Supreme Court last year.

Beyond the area of criminal justice, I am aware of the emphasis that General Overholt places on providing quality legal assistance to the soldier. This is a fine program. I think that the creative approaches you are taking to help these soldiers cannot fail to improve morale and enhance readiness. We recruit soldiers from all over the country and send many of them to remote locations. They need your support. Sometimes it's good to have a spouse, or a chaplain, or a hunting buddy to share your problems with—but there are times when you'd trade all three for a good attorney.

Your responsibilities go beyond being the soldier's lawyer. Your are also, first and foremost, the commander's lawyer. I have seen the role of the JAG Corps grow since the days of my service in World War II. You are more than lawyers: you are counselors. Webster defines counselor as "one that gives advice in legal matters." Your present role should and does extend further than providing the commander with strictly legal advice. You are a positive force in the system and you benefit from a training and a discipline that makes you unique among the many who would advise our commanders. I charge you with the duty of keeping your commanders on a straight course. Make sure that everything they do adds to the credibility of the Armed Forces, thereby strengthening the public's opinion and support for them. That is one of the best ways I can think of for maintaining the level of appropriations you need to protect the nation.

Government contracting is another area I am aware of where you are taking on a greater role and improving the system. The initiatives you are making in the procurement fraud area are certainly welcome. Your efforts to educate our contracting officers, so we get the most out of our defense dollar, are noteworthy. Keep it up.

Congress is relying on you to ensure that the commander is capable of successfully performing the military mission overseas within the metes and bounds of established law. I am advised that your recent efforts in the area of "operational law" are intended to accomplish this. I commend you for them. I know that some JAG officers accompanied

our forces in Grenada, and others have advised our leaders on the sensitive issues arising from our activities in Central America. I applaud your service, and I urge you to continue your vigilance in this area of your practice.

The law has grown so much of late that commanders need legal advice in areas that would have been unimaginable earlier in this century, or even a decade ago. Plaintiffs' lawyers are daily finding new, and more creative ways of dragging the military into court. The assistance your litigators give the Justice Department is crucial to enabling the Armed Forces to perform their primary mission. It is clear that the area of environmental litigation and its accompanying concerns are going to be large burdens for many commanders. You must be ready to deal with these issues, especially as they relate to the interplay of state and federal authority.

In short, you have a big job ahead of you. The Judge Advocate must be more than a lawyer. Your mission is to lead the commander through the tangled web so that the troops will be ready when called. You perform your job both under, and in support of the Constitution. Find a way for your commander to do what needs doing—but find a way for it to be done legally and constitutionally.

In 1775, your Corps started as a one-man office. You have grown to almost 1800 active duty and 2200 reserve component attorneys. That growth was brought on by your steadily expanding duties and the demonstrated need for your services. Be proud of the role that military officers—and especially military attorneys—play in our constitutional system. The Judge Advocate General's Corps, a strong defense, and freedom have been linked together for over 200 years. I challenge you to ensure they stay that way.

Prosecuting a Urinalysis Case: A Primer

*Captain David E. Fitzkee**
Officer in Charge, Karlsruhe Legal Services Center, 21st Support Command

Introduction

A new trial counsel receives a telephone call from a brigade commander. The commander has just learned of the results of a recent urinalysis, showing that one of the soldiers in the brigade tested positive. The commander wants to prosecute the soldier, and tells the trial counsel to prepare the case for trial. What actions should the trial counsel take?

The purpose of this article is to provide both new trial counsel and experienced trial counsel who have never tried a urinalysis case an overview of the issues that may arise in prosecuting such a case.[1] Although a urinalysis case is similar to many other cases involving scientific evidence, there are recurrent issues in urinalysis cases, and other considerations that are particular to urinalysis cases.

This article will address these issues in two general categories: (1) pre-preferral consideration, including the legal basis for administering the urinalysis, proper administration of the urinalysis, and the decision to proceed to trial; and (2) considerations in preparing for trial, including proving use, proving wrongfulness, and anticipating possible defenses.

Pre-Preferral Considerations

Legal Basis For Administering Urinalysis

In assessing the case before preferral of charges, the trial counsel must begin with a consideration of the legal basis upon which the accused was required to submit a urine sample. If there was not a proper basis to require the accused to provide a urine sample, the results will be suppressed as having been procured in violation of the fourth amendment. A compulsory urinalysis is a seizure within the meaning of the fourth amendment.[2] Trial counsel should always anticipate a motion to suppress the urinalysis results. A successful motion to suppress the urinalysis results usually ends the government's case, because in most instances the urinalysis result is the only evidence of the accused's misconduct. There are three frequent bases for obtaining a urine sample: a health and welfare inspection,[3] a seizure based on probable cause,[4] and a seizure pursuant to the accused's consent.[5]

Health and Welfare Inspection. Perhaps the most frequent basis for administering a urinalysis is pursuant to a health and welfare inspection under Military Rule of Evidence 313(b). An inspection is "an examination of the whole or part of a unit . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness or good order and discipline of

---

*This article is based upon a paper originally submitted in May 1988 in satisfaction of the Writing for Publication elective of the 36th Judge Advocate Officer Graduate Course.

[1] Although this article is written primarily for trial counsel, it should also prove useful to defense counsel who are trying a urinalysis case.

[2] Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

[3] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313(b) [hereinafter Mil. R. Evid.].

[4] Mil R. Evid. 315.

[5] Mil R. Evid. 314(e).

the unit."[6] Evidence obtained during a proper inspection is admissible.[7]

If the commander, with a proper purpose, selects both the time and the portion of the unit to be inspected, the inspection is proper.[8] When the commander has specified a period of time within which the unit is to provide urine samples, it may be permissible for a subordinate to choose the exact date within that period of time.[9] The Court of Military Appeals has upheld the urinalysis testing of a prison staff where a Naval petty officer, not the commander, selected the date of testing based on operational considerations to comply with a command regulation to conduct urinalysis monthly.[10]

Even if the commander directs the urinalysis, the inspection is not proper unless done with the primary purpose of ensuring security, fitness, or good order and discipline.[11] If the commander directs the urinalysis with the primary purpose of obtaining evidence, the inspection is not proper. This does not mean, however, that the urinalysis fails as an inspection merely because the commander contemplated using the results for disciplinary proceedings.[12] A commander may have a *secondary* purpose of using the results in disciplinary proceedings, as long as the *primary* purpose is proper.[13]

The trial counsel should determine whether the commander had previously scheduled the urinalysis, and if so, when and why the commander selected the date. An inspection need not be previously scheduled, but prior scheduling would tend to show that the primary purpose was proper. If the urinalysis was not previously scheduled and was directed immediately after a report that soldiers in the unit were using illegal drugs, the trial counsel would have to prove by clear and convincing evidence that the urinalysis was indeed an inspection rather than a subterfuge for a search.[14]

If only part of the unit is required to provide urine samples, the trial counsel should determine how the commander selected those to be tested. The commander may choose only a part of the unit to inspect, and there is no requirement that the commander choose the part to inspect at random.[15] Random selection, however, tends to show that the inspection was for a proper primary purpose, and not a subterfuge to search particular individuals.[16] If the commander selects specific soldiers by name to provide a urine sample, the trial counsel would again have the more difficult burden of proving by clear and convincing evidence that the urinalysis was indeed an inspection.[17]

Probable Cause. A second common basis for administering a urinalysis occurs when there is probable cause to believe that the soldier has recently used illegal drugs. Probable cause determinations frequently arise in two contexts in urinalysis cases. The first occurs when a soldier in the unit reports to the commander that other soldiers in the unit used drugs at a particular time.[18] The second occurs when a noncommissioned officer in the unit reports to the commander that a soldier is acting peculiarly without an apparent reason.[19]

The first situation—where an informant provides information to the commander—implicates all federal and military cases concerning probable cause based on an informant's report. The commander must look to the "totality of the circumstances" to determine the existence of probable cause.[20] In looking to the totality of the circumstances in a urinalysis case, the commander and the trial counsel must be especially sensitive to the "freshness" of the informant's report relative to the drug detection time. Urine testing can detect the presence of a drug only within

---

[6] Mil R. Evid. 313(b).

[7] *Id.*

[8] All inspections need not be conducted or directed by a commander; "any individual placed in a[n] . . . appropriate supervisory position may inspect the personnel and property within his or her control." Mil R. Evid. 313(b) analysis. For example, a platoon leader may inspect his platoon. Urinalyses typically must be directed by a commander, however, because he is the only person in the unit in a command or supervisory position over all the persons to be tested in the unit.

[9] *See* United States v. Johnston, 24 M.J. 271 (C.M.A. 1987).

[10] *Id.*

[11] Mil R. Evid. 313(b).

[12] United States v. Rodriguez, 23 M.J. 896 (A.C.M.R. 1987).

[13] *Id. Rodriguez* recognizes that it is not unreasonable or improper for a commander directing urine testing to intend to take disciplinary action against soldiers who are identified as drug users. Many commanders contemplate disciplinary action against drug abusers because such abuse undermines the fitness of the abuser, and the good order, discipline, and fitness of the entire unit.

[14] Mil. R. Evid. 313(b). *See* United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985), affirming the military judge's suppression of urinalysis results, where the company commander, within three days of receiving a report that sergeants in his unit were using drugs, directed a urinalysis. The military judge held that the commander's primary purpose in ordering the urinalysis was to locate drug abusers and to initiate disciplinary actions against them.

[15] Mil. R. Evid. 313(b).

[16] There are at least two ways that commanders often select soldiers at random to provide urine samples, when the entire unit does not provide samples. One way is for the commander to pull numbers from a hat, requiring that all soldiers present for duty with a social security number ending in the same number as that drawn from the hat provide a sample. A similar method is to pull platoon numbers from a hat, requiring that all soldiers present for duty in the selected platoons provide a sample. Trial counsel should encourage commanders to select soldiers at random, even though random selection is not required. Random selection precludes a successful challenge that the command selected particular soldiers to provide samples. It may also help deter drug abuse by preventing soldiers from being able to predict which platoon will take the next urinalysis; such predictions are possible when the commander selects soldiers by systematically rotating through platoons.

[17] Mil R. Evid. 313(b).

[18] *See, e.g.*, United States v. Rodriguez, 23 M.J. 896 (A.C.M.R. 1987).

[19] *See, e.g.*, United States v. Shepherd, 24 M.J. 596 (A.F.C.M.R. 1987).

[20] Illinois v. Gates, 462 U.S. 213 (1983).

a limited time after the soldier ingested the drug.[21] The detection time depends chiefly on the type and quantity of the drug the soldier has ingested. The Department of the Army has determined the maximum drug detection time for seven illegal drugs.[22] If the time between the accused's reported use of drugs and the taking of the urine sample exceeds the maximum detection time for that drug, the urinalysis result will be inadmissible because it was procured without probable cause. The positive urinalysis result could have detected only a second use, for which there was no probable cause to direct a urinalysis.

The second situation in which probable cause determinations frequently arise in urinalysis cases is where a noncommissioned officer reports to the commander that a subordinate is acting strangely without apparent explanation. This is a prime situation for confusing the *possibility* that drugs caused the unusual behavior with the *probability* that drugs caused the behavior. In *United States v. Shepherd,*[23] the base commander authorized the seizure of the accused's urine and blood, which contained drugs and alcohol, based on the fact that the accused was found asleep on fire watch, was exceptionally difficult to awaken, and smelled of alcohol. The Air Force Court of Military Review reversed his conviction, holding that the urinalysis lacked probable cause. The court advised that "[w]hether evidence of alcohol use is present or not, the record should reveal some articulable indicia whereby a trained observer might surmise that an individual recently used a controlled substance."[24] Thus, in this situation the trial counsel must ascertain from the commander the "articulable indicia" which led to a conclusion that drugs, rather than something else, caused the behavior. A commander's belief that drugs might explain the behavior is insufficient, because "[p]ossibility does not equate with probability."[25]

The "good faith" and "inevitable discovery" exceptions to the probable cause requirement will, where applicable, allow the admission of urinalysis results procured without probable cause.[26] Trial counsel who are forced to rely on these exceptions should be sensitive to the possible conflict between these exceptions and the "limited use" policy.[27] The limited use policy prohibits urinalysis results from being used against a soldier in any action under the Uniform Code of Military Justice, when the urine sample was "taken to determine a soldier's fitness for duty and need for counseling, rehabilitation, or other medical treatment."[28] This prohibition arguably applies whenever probable cause is lacking, because, absent probable cause, the test is taken to determine the soldier's fitness for duty. The better approach, however, is to construe this prohibition to apply only when no Military Rule of Evidence would allow admission of the evidence.

Consent. The third basis for administering a urinalysis is pursuant to the accused's consent.[29] The government must prove by clear and convincing evidence that the accused consented voluntarily.[30] The voluntariness of the consent is determined by looking at the "totality of the circumstances."[31] In evaluating the totality of the circumstances, trial counsel must determine whether the commander said anything to the accused about the effect of the accused's failure to consent to the urinalysis. When the commander requests consent, the accused may not be misled by implying that probable cause exists to order the accused to provide a urine sample if the accused does not consent.[32] If the accused asks what will happen if consent is not granted, the accused may be informed that the commander has the authority under Army Regulation 600–85 to direct the accused to provide a sample.[33] Such a statement is true and not misleading. The commander is not obligated to explain to the accused that the results of such a non-consensual urinalysis generally are not admissible, absent probable cause. Such an explanation, however, may help establish that the consent was voluntary.

Proper Administration of the Urinalysis

After determining whether there was a proper basis for seizing the accused's urine, the trial counsel must determine whether the urinalysis was properly administered. The trial counsel can assess the administration of the urinalysis by determining if procedures used to collect and handle the

---

[21] *See* Message, HQ, Dept. of Army, 021937Z Sep 83, subject: Recommended Drug Testing Intervals.

[22] *Id.* The suggested maximum drug detection times for the seven drugs are: amphetamines—7 days; barbiturates—7 days; cocaine—4 days; heroin/morphine—4 days; marijuana—16 days; methaqualone—5 days; and phencyclidine—8 days.

[23] 24 M.J. 596 (A.F.C.M.R. 1987).

[24] *Id.* at 599.

[25] *Id.* at 599.

[26] Mil. R. Evid. 311(b)(3) (good faith) and Mil. R. Evid. 311(b)(2) (inevitable discovery). Thus, if a commander authorized a person acting in a law enforcement capacity to obtain a urine sample from a soldier, the urinalysis results may be admissible under the good faith exception if the commander had a substantial basis for his belief that he had probable cause to do so, notwithstanding a court's later determination that the commander lacked probable cause. *But see,* United States v. Queen, 26 M.J. 136 (C.M.A. 1988). Likewise, if a commander directed a soldier to provide a urine sample, not based on probable cause, the urinalysis results are admissible under the inevitable discovery exception if the sample inevitably would have been taken in the near future, such as if a unit-wide urinalysis had been previously scheduled for the next morning.

[27] The limited use policy is defined in Army Reg. 600–85, Personnel: General–Alcohol and Drug Abuse Prevention and Control Program, para. 6–4 (3 November 1986) [hereinafter AR 600–85].

[28] *Id.* para. 6–4a(1).

[29] Mil. R. Evid. 314(e).

[30] *Id.*

[31] United States v. Stoecker, 17 M.J. 158 (C.M.A. 1984).

[32] United States v. Pellman, 24 M.J. 672 (A.F.C.M.R. 1987).

[33] United States v. White, 24 M.J. 923 (A.F.C.M.R. 1987).

urine samples were in accordance with the requirements set forth in Appendix E to Army Regulation 600–85.[34]

Violations of the procedures mandated by Appendix E to Army Regulation 600–85 fall into two general categories: those that implicate the chain of custody, and those that do not. Errors implicating the chain of custody are clearly more significant, because they are more likely to preclude successful prosecution. Although weak links in the chain of custody generally go only to the weight of the evidence, rather than to the admissibility, the military judge must nevertheless be reasonably certain, before admitting the urinalysis results as evidence, that the urine was not changed in any important respect before testing.[35] If the unit alcohol and drug coordinator (UADC) or observer administering the urinalysis failed to properly secure and account for the specimen, thus breaking the chain of custody, the military judge may well suppress the urine test results.

Other technical violations of Appendix E to Army Regulation 600–85 which do not implicate the chain of custody, are not as significant. Examples of such technical violations include having the UADC also perform duties as an observer, rather than having a separate observer; having an observer below the grade of E–5; failing to maintain a separate unit urinalysis ledger; and failing to have the observer initial the label on the bottle. There is no rigid exclusionary rule requiring the suppression of evidence merely because it was collected in violation of an agency's regulations.[36] Such evidence is excluded only when the violated regulation: (1) is mandated by the Constitution or federal law; or (2) establishes an important protection of privacy.[37] Neither prong is applicable to violations of Appendix E to Army Regulation 600–85 because the regulation is not mandated by the Constitution or federal law, and it does not establish any protection of privacy.[38] Thus, technical violations of the regulation should not result in exclusion of the urinalysis results at trial, if the trial counsel can establish the chain of custody.

Although technical violations do not mandate exclusion of the results, the nature and number of the deviations from the regulation may cause the fact-finder to equate failure to comply with technical procedures with failure to maintain an adequate chain of custody. Technical violations undermine the credibility of the observer and UADC as witnesses. This is particularly true when the accused is a noncommissioned officer with an otherwise excellent record. In such a case, the fact-finder may be looking for any colorable reason to disbelieve the scientific evidence. Thus, in assessing the case before preferral of charges, the trial counsel must be alert for any violations of the required procedures, regardless of whether such violations directly implicate the chain of custody.

To discover violations of Appendix E to AR 600–85, the trial counsel should interview not only the UADC and the observer, but also other soldiers who provided samples to the same observer as the accused during the urinalysis. The UADC and observer may describe their administration of the urinalysis in a light most favorable to them. If they are familiar with how the urinalysis should be run, they may represent that they did it that way, forgetting to mention short-cuts they may have taken to collect the samples faster. Other soldiers may give a more objective account of how the samples were collected. They will certainly have a feel

---

[34] AR 600–85, Appendix E establishes the standard operating procedures for the proper administration of a urinalysis. A urinalysis is administered by at least two people at the unit. The first is the unit alcohol and drug coordinator (UADC), who is primarily responsible for ensuring that all the paperwork is correct. The UADC will often perform his duties at a desk outside the latrine where the soldiers are providing samples. At the desk the UADC will have the items he needs to conduct the urinalysis: empty plastic bottles with lids, labels to attach to the bottles, small 12-bottle boxes in which to place the bottles, DA Forms 5180–R (Urinalysis Custody and Report Record), urinalysis ledger, pens, and a copy of AR 600–85 to remind him how to administer the urinalysis properly. The second person involved in administering the urinalysis is the observer, who is primarily responsible for watching soldiers urinate into the bottle and preventing tampering with samples. The observer must be at least an E–5 of the same sex as the soldier providing the sample.

A soldier who is ready to provide a sample goes to the UADC's desk. The UADC writes the soldier's social security number, often taken from the soldier's identification card, the julian date, and an assigned specimen number on a label. The UADC puts the label on an empty bottle and gives the bottle to the soldier in the presence of the observer. The soldier verifies his or her social security number by initialling the label and by signing a separate urinalysis ledger. The UADC has recorded the soldier's social security number, julian date, specimen number, and observer's name on the ledger. The observer then verifies the label and signs the ledger.

The observer then escorts the soldier with the bottle to the latrine, where the observer watches the soldier urinate into the bottle. The soldier caps the bottle, and gives it to the observer, who retains custody until it is returned to the UADC. When transferring custody to the UADC, the observer initials the label on each bottle, and signs the chain of custody section of the DA Form 5180–R, which the UADC has prepared, releasing up to twelve samples to the UADC. Upon receipt, the UADC also initials the label of each bottle and acknowledges receipt by signing the chain of custody section of the DA Form 5180–R.

The UADC puts the DA Form 5180–R, which contains the record of the chain of custody for up to twelve samples, into the small box that contains the corresponding samples. The UADC secures all boxes until he transports them to the installation biochemical collection point, which must be within 24 hours after collection. At the collection point, the installation biochemical testing coordinator opens the unsealed boxes, reviews each DA Form 5180–R for completeness and accuracy, compares the information on each labelled bottle to the information on the corresponding DA Form 5180–R, and ensures that each has a sufficient quantity of urine. If the testing coordinator finds no deficiencies, he directs the UADC to again sign the chain of custody section of each DA Form 5180–R, releasing custody of the samples to the testing coordinator, who also signs the DA Form 5180–R. The UADC then uses tape to seal each edge and flap of each box, signs across the top and bottom of each box, and gives all the boxes to the testing coordinator. The testing coordinator sends the boxes by courier or registered mail to the laboratory for analysis. The coordinator may decide to prescreen all samples at the installation, in which case he would forward to the laboratory only those samples that screened positive, discarding the negative samples. If the testing coordinator pre-screens the samples, he must do so in accordance with the procedures specified in Appendix F to AR 600–85.

[35] Unites States v. Hudson, 20 M.J. 607 (A.F.C.M.R. 1987), *pet. denied*, 21 M.J. 32 (C.M.A. 1985).

[36] United States v. Caceres, 440 U.S. 741 (1979) (Internal Revenue Service agent's tape recordings of conversation with the accused were not suppressed, even though the agent failed to procure the proper authorization to record specified in agency regulations).

[37] *Id.* For a military case applying the *Caceres* analysis to a violation of a Navy regulation requiring second-echelon command authorization for urinalyses involving more than 200 sample or 20% of a unit, *see* United States v. Hilbert, 22 M.J. 526 (N.M.C.M.R. 1986) (regulation was not mandated by the Constitution or federal law, and was not designed to protect individual rights).

[38] Regarding the first prong, the procedures of Appendix E to AR 600–85 are generally mandated by Dep't. of Defense Directive 1010.1, Drug Abuse Testing Program (Dec. 28, 1984). Regarding the second prong, it would be ludicrous to assert that Appendix E to AR 600–85, which requires that an observer watch the soldier urinate directly into a bottle, was promulgated to confer privacy rights on soldiers.

for whether the urinalysis was tightly controlled, or whether there were possibilities for tampering with or confusing samples. These interviews of other soldiers will often provide the trial counsel excellent information for use at trial in rebutting the accused's account of how the samples were collected.

The trial counsel should conduct these interviews as soon as possible after learning that the command is contemplating court-martial charges. Prompt interviews will reduce the chance that the witnesses may confuse the urinalysis in question with another in which they participated. Prompt interviews will also increase the likelihood that the UADC and the observer will specifically remember the accused providing a specimen on the day in question. This will allow them to testify with better effect than if they can testify only about their customary procedures, without independent recollection of collecting the accused's sample.

Decision To Proceed To Court-Martial

In recommending whether to proceed to court-martial with the case, the trial counsel must carefully weigh the likelihood of successful prosecution and the likely sentence against the consequence of unsuccessful prosecution. The likelihood of success depends upon many factors, including whether there was a proper legal basis for seizing the accused's urine and whether the accused's sample was collected and processed in accordance with Appendix E, AR 600–85.[39] The likely sentence also depends upon many factors, including the accused's rank, record, past duty performance, and the drug involved. The consequence of failure is that the command will be precluded from later administratively discharging the accused based on the same drug use of which he was acquitted.[40]

After analyzing the case the trial counsel may recommend that the command administratively separate the accused rather than prefer charges. An administrative proceeding has several advantages to the government, especially in cases where the evidence may be suppressed at trial, or where reasonable doubt may exist. First, the government's burden of proof is lighter: a preponderance versus beyond a reasonable doubt.[41] Second, exclusionary rules generally do not apply.[42] Third, the matter may be resolved more quickly and inexpensively, because the government need not produce an expert witness from the laboratory.[43] The trial counsel should fully apprise the command of his or her assessment of the case.

Other Pre-Preferral Considerations

Before preferring charges, trial counsel should be sure to request the "litigation report" from the laboratory.[44] Although there is no legal requirement to have the litigation report before preferring charges, it is prudent to do so for three reasons. First, it may take up to a month to receive the litigation packet after requesting it; if charges have been preferred, the speedy trial clock has been running. Second, the trial counsel usually cannot prosecute the case without the test results contained in the litigation packet. Third, after preferral of charges the defense counsel will certainly serve a discovery request seeking, among other documents, the litigation report; the government should be prepared to respond in a timely manner.

Before preferring charges, the trial counsel must also determine the time window within which the government alleges that the accused used the drug. It is probably safe to use a charging window of 30 days for marijuana and 15 days for all other drugs.[45] A prudent trial counsel will also confer with an expert from the laboratory where the accused's urine was tested. The expert, knowing the quantity of the drug metabolites in the accused's urine, the rate at which the human body rids itself of the drug, and the maximum level of drug metabolites possible in urine, can render a professional opinion as to the maximum number of days before the accused provided the urine sample that the drug could have been ingested. The trial counsel should then use as the charging window whichever time is longer: that recommended by Department of the Army or that recommended by the expert.[46]

A final pre-preferral consideration is determining what level of court-martial the trial counsel should recommend that the case be referred to.[47] In addition to the considerations that apply in determining appropriate referral in any case,[48] the trial counsel should be sensitive to the potential impact of Army regulations mandating the processing for separation of all soldiers in the grade of E–5 and above who are first-time drug abusers, and all other soldiers who are

---

[39] The legal bases for conducting urinalyses and the proper administration of a urinalysis are discussed above. Other factors that may affect the likelihood of successful prosecution include the relative skill and experience of counsel, whether the accused has some colorable explanation of how the drug got into his system, such as innocent ingestion, and whether the accused can raise the "good soldier" defense by calling witnesses to attest to his character. These defenses are discussed below.

[40] Army Reg. 635–200, Personnel Separations: Enlisted Personnel, para. 1–19b (5 July 1984) [hereinafter AR 635–200].

[41] AR 635–200, para. 2–12a(1).

[42] AR 635–200, para. 2–11a.

[43] *See* AR 635–200, para. 2–10.

[44] The litigation packet is a multi-page document, typically containing a certified DA Form 5180–R (Urinalysis Custody and Report Record), the RIA results, the GC/MS results, and the laboratory chain of custody.

[45] *See* Message, HQ, Dept. of Army, 021937Z Sep 83, subject: Recommended Drug Testing Interval, which recommends minimum drug testing intervals of 30 days for marijuana and 15 days for all other drugs. This recommendation is based on the maximum drug detection time, plus a safety buffer, and is designed to preclude the possibility that a second urinalysis will reflect drug use measured at an earlier urinalysis.

[46] It is better for the trial counsel to charge a liberal, wide window, because the specification can always be amended at trial to narrow the window to conform to the testimony, including the possible testimony of a defense expert witness. Narrowing the window, as opposed to expanding it, reduces the likelihood that the defense can claim that the amended specification failed to put the accused on notice of the charges against which must be defended. *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 603 [hereinafter R.C.M.].

[47] The decision on the level of the court-martial need not be made before preferral, but the trial counsel will want to have discussed this matter with the company, battalion, and brigade commanders before preferral, so that the case may be expeditiously referred after preferral.

[48] *See* R.C.M. 306(b) discussion.

second-time drug abusers.[49] Such soldiers must be processed for separation by either initiating an administrative separation action or by referring their charges to a court-martial authorized to impose a punitive discharge.[50] Accordingly, the trial counsel should consider recommending referral of these cases to a court authorized to impose a punitive discharge.[51]

Considerations in Preparing for Trial

Proving Use

Because "use" is one of the two elements of the offense,[52] the trial counsel must decide how to prove this element at trial. In some early urinalysis cases the government proved use by introducing the testimony of the UADC and observer linking the accused to a particular urine sample, and then introducing the positive urinalysis results as a business record.[53] The government was able to convict the accused without the testimony of an expert witness.

In 1987 the Court of Military Appeals in *United States v. Murphy* ended this practice, holding that "[e]xpert testimony interpreting the [urinalysis] tests or some other lawful substitute in the record is required to provide a rational basis upon which the fact-finder may draw an inference that [a controlled substance] was used."[54] The court in *Murphy* reasoned that there was no basis in the record for the fact-finder to conclude that the metabolite found in the urine had any relation to the drug which the accused was alleged to have used. The court further noted that there was no evidence that the drug metabolite was not naturally produced by the accused's body, or produced as a result of consuming some lawful substance. The court did not hold that the government must always produce an expert witness in a urinalysis case. If the government does not produce an expert witness, however, it must provide "some other lawful substitute" to establish the required facts. The court suggested two such lawful substitutes: stipulation of fact, and judicial notice.[55]

Stipulation. The accused and the defense counsel may well be reluctant to enter into a stipulation of fact, absent some *quid pro quo* from the government. If, however, the accused is defending on the basis that his ingestion was not wrongful, he may be willing to stipulate. Such a situation arose in *United States v. Spann*, where the accused stipulated to the validity of the Air Force drug testing program, to the procedures used to collect and process his urine, and to the fact that the presence of cocaine metabolites in his urine indicated that he had ingested cocaine.[56] The accused then defended on the basis that the government failed to prove wrongfulness. The accused testified that his medication must have caused his positive urinalysis.

The Air Force Court of Military Review affirmed Spann's conviction, holding that the stipulation of fact, coupled with the laboratory reports, provided a factual basis for the fact-finder to conclude that the accused used cocaine. The court specifically held that such a stipulation is an "adequate substitute" for an expert witness under *Murphy*.[57]

The trial counsel should always consider asking the defense counsel to stipulate to key facts. The defense's willingness to stipulate could eliminate the need for the government to produce an expert witness for its case-in chief.[58] Such a stipulation would also serve to alert the trial counsel that the defense will be that the accused's use was not wrongful.

Judicial Notice. Judicial notice is a second possible "other lawful substitute" for an expert witness to explain the urinalysis results. There are no reported cases since *Murphy* in which the trial counsel attempted to use judicial notice as a substitute for an expert witness.

There are at lease two facts "capable of accurate and ready determination,"[59] such that they should be judicially noticed.[60] First, military drug testing procedures, which consist of a radioimmunoassay screening test and a gas chromatography/mass spectrometry confirmation test, can prove that tested urine contains a certain illegal drug metabolite.[61] Second, the presence of a sufficient concentration of a certain drug metabolite in the urine can prove that the provider of the urine ingested the drug that produces the drug metabolite in the urine.[62] If the trial counsel can convince the military judge to judicially notice these two facts, this could be a "lawful substitute" for the expert witness.

---

[49] *See* AR 600–85, para. 1–11c,d; AR 635–200, para. 14–12c(2).

[50] *See* AR 635–200, para. 14–12.

[51] Such a referral avoids the need to initiate a concurrent administrative separation action for the same drug use that forms the basis of the court-martial. It also avoids the contradiction in seeking the soldier's administrative separation while concurrently suggesting, by not referring the case to a court empowered to impose a punitive discharge, that discharge is not warranted. Of course, if the case is at court-martial because the accused turned down nonjudicial punishment, the trial counsel must be prepared to show that referral to a court-martial authorized to impose a punitive discharge is not vindictive prosecution.

[52] Manual for Courts-Martial, United States, 1984, Part IV, para. 37(b)2 [hereinafter MCM, 1984].

[53] *See, e.g.*, United States v. Mercer, 23 M.J. 580 (N.M.C.M.R. 1986), *rev'd*, 25 M.J. 160 (C.M.A. 1987); United States v. Cordero, 21 M.J. 714 (A.F.C.M.R. 1985).

[54] United States v. Murphy, 23 M.J. 310, 312 (C.M.A. 1987).

[55] *Id.*

[56] United States v. Spann, 24 M.J. 508 (A.F.C.M.R. 1987).

[57] *Id.* at 511.

[58] The government still might have to produce an expert in rebuttal if, for example, the defense has an expert testify regarding passive inhalation. In other cases the government could rebut with a local expert witness. For example, if, as in *Spann*, the accused asserts that the cocaine metabolites in his urine came from his codeine pills, a local expert could probably testify that codeine, a derivative of opium, is chemically unrelated to cocaine, which is obtained from coca leaves. *Id.* at 511 n.1.

[59] Mil. R. Evid. 201(b).

[60] W. Anderson, *Judicial Notice in Urinalysis Cases*, The Army Lawyer, Sept. 1988, at 19.

[61] *See id.* at 22.

[62] *See id.* at 25.

Because judicial notice in this area is novel, the trial counsel seeking judicial notice should do so in an Article 39a session well in advance of trial, so that if the judge declines to take judicial notice of these key facts, the trial counsel can still arrange to produce an expert witness at trial.

Expert Witness. If the trial counsel is unable to procure a stipulation or get the military judge to take judicial notice, an expert witness can be used to explain the laboratory reports. Often this will be an expert from the laboratory where the accused's urine was tested. Because of the importance of the expert witness' testimony to the successful prosecution of the case, trial counsel must very carefully plan their questions to ensure that the expert testifies on all key points. After establishing the witness as an expert, the trial counsel should use the expert's testimony to: explain how the laboratory receives, processes, and tests urine samples; explain the scientific principles behind the radioimmunoassay (RIA) test and the gas chromatography/mass spectrometry (GC/MS) test that the laboratory uses; explain the results of the tests of the accused's sample; explain the meaning of the results; explain the internal and external quality control procedures that guarantee that the result is accurate; and introduce into evidence the accused's urine bottle and the laboratory reports pertaining to that sample. This section of this article will summarize the key facts about which the expert can testify.

Urine samples typically arrive by registered mail in the laboratory's mail room. The unopened boxes are thereafter transferred to the receiving and processing section.[63] A technician inspects each sealed box, which contains up to twelve urine samples, to ensure that the box is sealed with tape. If the box is not sealed, or there are other signs of tampering, the samples in that box are rejected, and not tested. If everything is in order, the processing technician opens the box and compares the social security number and specimen number on each bottle with the numbers on the DA Form 5180–R that accompanied the box. Each number must exactly correspond. The technician assigns each accepted sample a laboratory accession number, by which the sample is tracked throughout the laboratory. The technician places this number on the urine bottle and on the DA Form 5180–R. The samples are then configured into batches for testing, and are put into temporary storage in a secure, limited-access area. Other technicians later conduct tests by removing aliquots from the bottles kept in temporary storage. All tests are documented to establish a proper chain of custody. The bottles remain in temporary storage until the sample is determined to be negative and is discarded, or until it is determined to be positive and is transferred to long-term storage. The laboratory determines that a sample is negative when the sample contains no drug or drug metabolites or contains drug or drug metabolites at threshold levels below those established by Department of Defense ("DOD"). The laboratory determines that a sample is positive when two separate tests by RIA and GC/MS confirm that it contains drugs or drug metabolites at levels exceeding the DOD thresholds.[64]

Technicians use a radioimmunoassay (RIA) to screen every sample that the laboratory accepts.[65] The RIA test is based on the interaction of a radioactive antigen, an antibody, and the urine.[66] The antibody, commercially prepared, is developed by injecting an animal with a drug metabolite, causing the animal to develop antibodies to that drug. The antibodies are harvested from the animal's bloodstream. The laboratory adds a specific quantity of the antibodies to a specific quantity of urine. The laboratory also adds a specific quantity of radioactively-labeled antigen, a specific drug metabolite, to the urine. The radioactive antigen will bind with the antibodies. If the tested urine also contains drug metabolites, those non-radioactive metabolites will compete with, and proportionately displace, the radioactive metabolites for limited binding sites with the antibodies. The more drug metabolites are in the urine, the more they will bind with the antibodies, leaving fewer available binding sites for the radioactive metabolites.[67]

The laboratory then isolates the antibodies, to which the drug metabolites have bound, either from the accused's urine or from the radioactive antigen added.[68] The laboratory measures the radioactivity of the antibodies with a gamma counter. A negative urine sample will yield a high gamma count, because there was no drug metabolite in the urine to displace the radioactive metabolites that bound to the antibodies. Conversely, if the urine sample contained a high level of drug metabolites, the antibodies will register a low gamma count, because the drug metabolites in the urine took some of the binding sites on the antibodies that the radioactive drug metabolite otherwise would have occupied.[69]

The laboratory can determine the approximate concentration of drug metabolites in the urine by comparing the gamma counts associated with antibodies from the urine sample to the gamma counts associated with antibodies that have reacted with known quantities of drug metabolites.[70] If the urine sample contains a concentration of drug metabolites greater than the DOD threshold, the sample is considered presumptively positive, but it is not reported as positive until confirmed by GC/MS.[71]

GC/MS testing allows the laboratory to confirm the presence of the drug metabolite in the presumptively positive urine sample by identifying the drug metabolites'

---

[63] Interview with Major Jeffrey A. Gere, United States Army Medical Services Corps, Officer in Charge, United States Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, Maryland, at the Fort Meade Laboratory (June 1, 1987) and at Fort Riley, Kansas (June 10–11, 1987). These interviews were conducted in preparation for Major Gere's testimony as an expert in the fields of chemistry and forensic toxicology at a contested urinalysis case.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

unique chemical structure.[72] To conduct GC/MS testing, technicians procure a separate aliquot from the presumptively positive sample, prepare the urine for testing, and inject the urine into a gas chromatograph portion of the GC/MS instrument.[73] The gas chromatograph separates the components of the urine by vaporizing it and routing it through a long, thin column, which consists of materials that cause different components to emerge from the end of the column at different times.[74] The length of time that it takes a component to travel through the column identifies the component, but this is not a positive identification, because several chemicals may take the same time to travel through the column.[75] The gas chromatograph routes into the mass spectrometer those substances with retention times in the column corresponding to known drug metabolites.[76]

The mass spectrometer uses an electron beam to bombard the suspected drug metabolites, which the gas chromatograph has separated from the rest of the urine.[77] This bombardment causes the metabolites to fragment into a unique pattern, which the mass spectrometer records.[78] An analyst can positively identify the metabolites by their unique fragmentation pattern.[79]

The GC/MS instrument also precisely quantifies the amount of drug metabolite in the urine sample.[80] If the quantity is greater than DOD standards, the sample is reported as positive.

The expert can testify as to the scientific acceptability of the RIA and GC/MS tests, when used together, in identifying the presence of drugs or drug metabolites in urine.[81] He can also testify, after examining the laboratory results concerning the entire batch of samples in which the accused's sample was tested, that both the RIA instrument and the GC/MS instrument were working properly, and that the technicians properly operated these instruments. The expert should also be able to authenticate all the entries by laboratory personnel on the DA Form 5180-R, on the RIA laboratory results and accompanying chain of custody, on the GC/MS laboratory results and accompanying chain of custody, and on the urine bottle.

The trial counsel should move to admit these documents and urine bottle into evidence, having accounted for all entries on these documents and urine bottle through the testimony of the observer, UADC, installation biochemical testing coordinator, and the laboratory expert. The expert can testify that the drug metabolite found in the urine could have been there only because the person who provided the sample ingested, inhaled or injected, the drug.[82] No legal substance causes the body to produce the drug metabolite, in those quantities, and the body does not naturally produce the metabolite.[83] The ultimate opinion will be that the person who provided the urine sample in question ingested, inhaled or injected, a particular illegal drug within a particular time period before he provided the urine sample.

The expert should finally testify to the rigid quality control procedures, both internal and external to the laboratory, used to ensure that reported results are accurate. Internal quality control procedures include incorporating "open" and "blind" control samples into each batch of urine tested.[84] An "open" control sample is one whose location within the batch is known to the technicians. A "blind" control sample is one whose location is known to the laboratory's quality assurance branch, but not to the technicians. The purpose of an "open" control sample is to provide immediate feedback to the technicians operating the RIA and GC/MS instruments; they can immediately see whether the instruments are correctly identifying all "open" quality control samples. The purpose of the "blind" samples is to allow the laboratory's quality assurance branch to ensure that the technicians properly identified all positive and negative "blind" samples in the batch. This review of the technicians' work by both the quality assurance branch and by the certifying laboratory official is an important aspect of the laboratory's internal quality control.[85]

External quality control is conducted by the Division of Toxicology, Armed Forces Institute of Pathology (AFIP).[86] Each month AFIP sends known positive and negative samples to each certified laboratory. The laboratory is aware that the samples are from AFIP, but it is not aware of which samples are positive or negative. The laboratory must test the samples, identify the positive samples

---

[72] *Id.*

[73] Bleser and Imwinkleried, *Gas Chromatography—Mass Spectrometry (GC/MS)*, 7 The Champion 6 (1983).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Interview with Major Jeffrey A. Gere, *supra* note 63.

[82] *Id.*

[83] *Id.* Poppy seeds produce the same metabolites that are produced by heroin; codeine and morphine. Amphetamines produce the same metabolites as some prescription drugs. Nevertheless, toxicologists can usually determine if the metabolites were the result of illegal drug use by the concentration levels of the metabolites in the urine. *See generally*, Anderson, *supra* note 60.

[84] *Id.* A batch is a configuration of urine samples. A batch to be tested by RIA has 320 samples: 219 unknown samples; 60 quality control standards having various known concentrations of drugs, which are used to create the calibration curve to quantify those unknown samples that are determined to positive; and 41 other quality control samples. Of these 41 quality control samples, 26 are "open" (13 positive and 13 negative) 15 are "blind" (8 positive and 7 negative). A batch to be tested by GC/MS has 13 samples: 8 unknown samples and 5 quality control samples, 3 of which are "open" (all positive), and two of which are "blind" (1 positive and 1 negative). *Id.*

[85] *Id.*

[86] *Id.*

by type of drug, quantify the drug metabolites in the positive samples, and return the results to AFIP for evaluation.[87]

AFIP also monitors each certified laboratory by sending pre-tested samples to the laboratories in a way that they cannot know that the samples came from AFIP.[88] These samples are called "double blind." On a quarterly basis, AFIP assigns fictitious social security numbers to these "double blind" samples, and sends the samples to Army installations. AFIP instructs the installation biochemical testing coordinator to integrate these control samples with the real samples sent to the laboratory. Thus, the laboratory cannot know that some of the samples in a particular shipment are from AFIP. The laboratory reports all results to AFIP and to the installation that provided the samples. AFIP thereby can determine whether the laboratory correctly reported the results of the AFIP "double blind" samples. If the laboratory incorrectly reports that any of the negative AFIP samples are positive, the laboratory can be decertified.[89]

Testimony on internal and external quality control can be critical in overcoming the skepticism that some panel members may have about urinalysis results.[90] The expert must be careful not to assert that the technicians are perfect, and never err. The key is that the internal and external quality control is so rigorous and thorough that any mistakes made are identified and corrected before the laboratory certifies and reports any results.[91]

The trial counsel must carefully plan to present the expert's testimony in a way that ensures that the fact-finder can follow the testimony and references to laboratory documents. The trial counsel and expert should first agree that the expert's testimony will be as simple and non-technical as possible. Confusion is always the trial counsel's enemy, particularly in a urinalysis case. There are at least three options for helping the fact-finder understand the expert's testimony through visual aids. First, the expert can use an overhead projector to show transparencies of critical laboratory documents pertaining to the accused's sample. Second, the expert can use an easel to show enlarged copies of the documents. Third, the expert can use a colored marker to highlight key portions of the documents, even though the fact-finder does not see the laboratory documents until they are received during deliberations. The first two options require the trial counsel to prepare the visual aids in advance, but the aids better assist the fact-finder in following the expert's testimony as it is given. Before attempting to use these two visual aids, however, trial counsel should know whether the judge will permit their use, as their use would allow the panel to see the documents before they were admitted into evidence.[92]

Proving Wrongfulness

The trial counsel must also consider how to prove the second element of the offense: that the use was wrongful.[93] The most common way of establishing wrongfulness is by relying on the fact-finder to draw the permissive inference that use of drugs is wrongful, absent evidence to the contrary.[94] Application of this presumption is straightforward when the accused presents no evidence that the use was not wrongful.[95]

The more difficult questions are whether this inference survives when the defense raises evidence that the use was not wrongful, and, if so, whether as a matter of law the inference alone is sufficient to support a conviction. The Court of Military Appeals answered both of the questions in the affirmative in *United States v. Ford.*[96] In *Ford,* a urinalysis case, the accused denied using marijuana during the period charged, and suggested that his now-estranged wife cooked the marijuana into his food. Other defense evidence established that the wife had both the motive and the opportunity to do so, and that she occasionally used marijuana. The accused was convicted, despite the government's inability to rebut the defense evidence concerning lack of wrongfulness.

On appeal, the Court of Military Appeals rejected the accused's argument that the permissive inference does not apply when the defense presents evidence that the use was

---

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] This skepticism may have originated with the well-publicized problems that military drug testing laboratories had when the DOD drug testing program started in 1983. *See, e.g.,* Roland, *Meade Laboratory Misidentifies Two Soldiers as Drug Users,* Army Times, Oct. 17, 1983, at 1, and Roland, *Army to Reverse Actions in Drug Case,* Army Times, Jan. 23, 1984, at 1. In a urinalysis case with members, one way to confront the early problems with the military's drug testing program, with which many members will be familiar, is to address the issue in voir dire. This may be done by asking if any member has read or heard any negative reports about military drug testing laboratories. The trial counsel can then ask each responding member whether he or she can judge the laboratory, not on what has been heard or read about how laboratories operated in the past, but on what is heard in court about current procedures. Then, unless the defense counsel raises past problems at the laboratories, the trial counsel need not again address the past problems, except perhaps to remind the members during closing argument that they promised to base their judgment of the laboratory based on the evidence presented in court. If the defense does raise the past problems, the trial counsel can have the expert witness testify in detail as to how the current procedures differ from those used in 1983, and the effect of those changes.

[91] Interview with Major Jeffrey A. Gere, *supra* note 63.

[92] A good way for the trial counsel to determine how the judge feels about such visual aids is to raise the matter in a conference under R.C.M. 802. If the judge hesitates to allow the trial counsel to show the laboratory documents to the panel before they are admitted into evidence, the trial counsel should point out to the judge that if the laboratory reports are not later admitted into evidence, the government's case is ended, so there could not be any danger of the panel being improperly influenced by seeing documents not later admitted. If the judge remains reluctant, the trial counsel wishing to use these visual aids could admit them into evidence in an Article 39a session; this procedure would be cumbersome, requiring much duplication of testimony.

[93] *See* MCM, 1984, Part IV, para. 37c (5).

[94] MCM, 1984, Part IV, para. 37c(5); *see* United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

[95] *See,* e.g., United States v. Bassano, 23 M.J. 661 (A.F.C.M.R. 1986).

[96] 23 M.J. 331 (C.M.A. 1987).

not wrongful.[97] The court also rejected the argument that when the defense raises evidence showing the use was not wrongful, the government must rebut this evidence. The court noted, however, that unless the government rebuts this evidence it runs an increased risk that the fact-finder will acquit the accused, either because it does not draw the inference or because it finds that the inference is insufficient to prove wrongfulness beyond a reasonable doubt.

Anticipating Defenses

In a urinalysis case, as in any case, the trial counsel should anticipate and prepare for possible defenses. There are five general matters that the accused might raise to challenge either the use or its wrongfulness: (1) the chain of custody was defective; (2) the laboratory erred in analyzing the accused's sample; (3) the accused passively inhaled drug smoke; (4) the accused unknowingly ate the drug; and (5) the accused is a good soldier and could not have used drugs.

The first possible challenge is that the chain of custody of the urine was defective, raising the possibility that it was not the accused's urine that was positive. The trial counsel will address this challenge during the case-in-chief, by presenting the testimony of everyone who handled the sample at the installation—usually the observer, UADC, and the installation biochemical test coordinator[98]—and the testimony of the laboratory expert concerning the handling of the sample at the laboratory.[99] Together, this testimony will explain and authenticate every significant entry on the DA Form 5180–R, the labels on the urine bottle, the urinalysis ledger that the UADC maintains, and all the laboratory documents, thereby establishing that it was the accused's urine that the laboratory tested as positive. The accused, challenging the chain of custody, may testify that the observer or UADC left the urine samples unattended or otherwise handled the samples in a way permitting confusion or tampering. The trial counsel can rebut this allegation with testimony from the observer, the UADC, or others who provided a sample during the urinalysis in question. The trial counsel's thorough preparation of the case-in-chief should preclude successful assertion of this defense.

The second possible defense is that the laboratory erred in analyzing the accused's urine. To raise the defense effectively the accused will need to have an expert witness testify, specifying the error. The accused's vague assertions of laboratory error, without an expert witness, are unlikely to be credible. Before trial, the trial counsel will know from the accused's request for the expert witness that the accused is calling an expert witness, and will know the essence of that testimony.[100] The trial counsel prepares for this defense by interviewing the defense expert and a government expert. These interviews provide the trial counsel with the information to prepare the cross-examination of the defense expert and to prepare the government expert to rebut. By having the government expert testify to the laboratory's handling procedures, scientific tests, and quality control during the case-in-chief, the trial counsel puts the defense expert in a difficult position to show that the laboratory erred. The chance of successful assertion of this defense is further reduced if the trial counsel effectively cross-examines the defense's expert witness, and produces the government expert to rebut the defense expert witness' specific allegations of error.

The third possible defense is that the accused passively inhaled smoke containing the drug, usually marijuana. This defense is based on a number of scientific studies that have documented the possibility of a person having measurable levels of marijuana metabolites in the urine after passively inhaling marijuana smoke.[101] Passive inhalation is unlikely to be a successful defense at trial for two reasons. First, passive inhalation of marijuana smoke will not result in the presence of marijuana metabolites at levels that would be deemed to be positive by the RIA screening test.[102] Thus, a urine sample having enough marijuana metabolites in it to be screened as positive by RIA at DOD threshold levels has more of the marijuana metabolites than could have been caused by passive inhalation. Second, to assert the defense

---

[97] This argument was based on the MCM's language that "[u]se . . . may be inferred to be wrongful in the absence of evidence to the contrary." *See* MCM, 1984, Part IV, para. 37c(5).

[98] For a summary of the testimony that the observer, UADC, and installation biochemical testing coordinator typically can give, *see* note 34, *supra.*

[99] For a discussion of the testimony that any expert witness from the laboratory can give, *see* text accompanying notes 64 through 92.

[100] *See* R.C.M. 703(c)(2)(B).

[101] *See* Cone, Johnson, Darwin, Yousefnejad, Mell, Paul, and Mitchell, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-tetrahydrocannabinol,* 11 J. Analytical Toxicology 89 (1987); Cone and Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure To Marijuana Smoke,* 40 Clinical Pharmacology & Therapeutics 247 (1986); Moreland, Bugge, Skuterud, Steen, Weth, and Kjelddsen, *Cannabinoids in Blood and Urine after Passive Inhalation of Cannabis Smoke,* 30 J. Forensic Sci. 997 (1985); Law, Mason, Moffat, King, and Marks, *Passive Inhalation of Cannabis Smoke,* 36 J. Pharmacy and Pharmacology 578 (1984); Perez-Reyes, DiGuiseppi, and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids,* 34 Clinical Pharmacology & Therapeutics 36 (1983); Zeidenberg, Bourdon, and Nahas, *Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites,* 134 Am. J. Psychiatry 76 (1977). For an excellent, short, readable summary and analysis of the studies on passive inhalation of marijuana smoke, *see* R. Willette, *Passive Inhalation of Marijuana Smoke* (Dec. 1987) (unpublished manuscript), and R. Willette, *A Study on Chronic Passive Exposure To Marijuana Smoke,* (Dec. 1987) (unpublished manuscript).

[102] Affidavit of Major Freddy C. Davis, United States Air Force, then the Chief of the Air Force Drug Testing Laboratory, Brooks Air Force Base, p. 9 (9 Nov. 1984). For example, in one study two to five people were put into a room measuring 10 by 11 by 7 feet with a smoking machine that consumed the equivalent of 40 marijuana cigarettes. They remained in the closed room for two hours. Their urine was then tested at various hours after they left the room. No sample contained more than 75 nanograms of total marijuana metabolites per milliliter of urine. None of these samples would have been screened positive by DOD, because DOD uses a screening threshold of 100 nanograms of total marijuana metabolites per milliliter. This unpublished study by Waterhouse is summarized in R. Willette, *Passive Inhalation of Marijuana Smoke* (Dec. 1987) (unpublished manuscript). In another more severe experiment, five people were put into a room measuring 8 by 7 by 8 feet for one hour for six consecutive days. Each hour in the room they passively inhaled the smoke from 16 marijuana cigarettes. Their urine was tested at various times after they left the room. Despite this prolonged, repeated passive inhalation, none of samples would have been screened positive by RIA at the 100 nanogram per milliliter level that DOD laboratories use. This study, funded by the Navy, was conducted at the National Institute on Drug Abuse. It is summarized in R. Willette, *A Study on Chronic Passive Exposure to Marijuana Smoke* (Dec. 1987) (unpublished manuscript). The study is reported in full in Cone and Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke,* 40 Clinical Pharmacology & Therapeutics 247 (1986) and Cone, Johnson, Darwin, Yousefnejad, Mell, Paul, and Mitchell, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-tetrahydrocannabinol,* 11 J. Analytical Toxicology 89 (1987).

of passive inhalation the accused must necessarily produce evidence that he was in the presence of marijuana smoke for some period of time shortly before he provided the urine sample. This evidence is unlikely to impress the fact-finder, and may do more harm than good to the accused.

If the accused asserts that he or she passively inhaled marijuana smoke, the trial counsel should cross-examine the accused to elicit as much detail as possible concerning the circumstances, such as the size of the room, the ventilation of the room, how long the accused was in the room, how much marijuana was smoked in the room, [103] the number of marijuana cigarettes being smoked simultaneously, how long after the passive inhalation the accused provided his urine sample, [104] and how many times he urinated between the passive inhalation and providing his urine sample for the urinalysis. [105] The trial counsel, having pinned the accused to this story on passive inhalation, can demonstrate the implausibility of the accused's version either by calling the laboratory expert in rebuttal, or by asking the military judge to take judicial notice of the studies and data available on passive inhalation. [106]

The fourth possible defense is that the accused unknowingly ate the drug. This defense is based on scientific studies documenting the possibility that unknowing ingestion of a drug can result in the presence of drug metabolites in the urine at levels exceeding DOD screening levels. [107] Unknowing oral ingestion, like passive inhalation, would negate the "wrongfulness" elements of the offense.

Although this defense is scientifically possible and may be easy for the accused to raise, the real issue is whether the fact-finder will believe the accused. [108] If the fact-finder does not believe the accused, the government can still prove the element of wrongfulness by the permissive inference, without producing evidence to rebut the accused's testimony. [109] The trial counsel's effective cross-examination of the accused may help the fact-finder to disbelieve the accused. The trial counsel should pin down the accused on what he believes he ate that contained drugs, how much of that food he ate, when and where he ate this food, who put the drugs in his food and why, and whether anyone can corroborate this story. The success of this cross-examination will depend on the trial counsel's advance warning of and preparation for this defense. The accused's answers to these questions should give the trial counsel something to rebut.

If the accused is able to answer these questions on cross-examination, the best rebuttal witness for the government is the person who the accused alleges tampered with the food. An expert witness may also rebut some of the accused's testimony by showing that the scenario that the accused described could not have caused any urine to be positive at such a level. For example, if the accused claimed to have drunk "herbal tea" (marijuana boiled in tea), the expert could testify that this does not explain marijuana metabolites in the accused's urine. [110]

If the accused is unable to answer these questions, but is asserting only that someone must have spiked the food, the accused's credibility will be diminished. The trial counsel will be able to argue the inherent unlikelihood of someone unknowingly eating drugs, the apparent lack of motive for anyone to spike the accused's food, and the unlikelihood of someone without a motive purchasing or using costly illegal drugs just to spike the accused's food.

The fifth possible defense is that the accused is a good soldier and could not have used drugs. This is the "good soldier" defense. This defense is authorized by Military Rule of Evidence 404a(1), permitting the accused to introduce evidence of a pertinent character trait, and military cases holding that good military character is pertinent when the accused is charged with an offense, such as use of drugs, that strikes at the heart of military discipline and readiness. [111] This defense permits the accused to introduce good military character evidence on the merits to show that the accused is not the type of soldier to use drugs. The accused can introduce this evidence without regard to whether the trial counsel has attacked the accused in any way.

The best way to rebut this defense is to produce witnesses who can testify that the accused's military character really is not good, or to cross-examine the defense character witnesses about their knowledge of specific instances of the

---

[103] One study on passive inhalation of marijuana smoke concludes that the amount of marijuana metabolites in the urine after passive inhalations depends "on the concentration of smoke which would be a function of room size, mass of THC smoked . . . and ventilation." Law, Mason, Moffat, King, and Marks, *Passive Inhalation of Cannabis Smoke*, 36 J. Pharmacy and Pharmacology 578, 580 (1984).

[104] The highest levels of marijuana metabolites in the urine will be within two to four hours after passive inhalation. *See* Cone and Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, 40 Clinical Pharmacology & Therapeutics 247 (1986) and Cone, Johnson, Darwin, Yousefnejad, Mell, Paul, and Mitchell, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-tetrahydrocannabinol*, 11 J. Analytical Toxicology 89 (1987).

[105] The highest concentrations of marijuana metabolites in the urine usually come from the first or second urination after passive inhalation. R. Willette, *Passive Inhalation of Marijuana Smoke* (Dec. 1987) (unpublished manuscript).

[106] *See* W. Anderson, *supra* note 60 at 25.

[107] *See* Law, Mason, Moffat, Gleadle, and King, *Forensic Aspects of the Metabolism and Excretion of Cannabinoids Following Oral Ingestion of Cannabis Resin*, 36 J. Pharmacy and Pharmacology 289 (1984); Ohlsson, Lundgren, Wahlen, Agurell, Hollister, and Gillespie, *Plasma Delta-9-tetrahydrocannabinol Concentrations and Clinical Effects After Oral Intravenous Administration and Smoking*, 28 Clinical Pharmacology & Therapeutics 409 (1980). For an excellent, readable summary of studies on oral ingestion of marijuana, *see* R. Willette, *Oral Ingestion of Cannabis Products* (Dec. 1987) (unpublished manuscript).

[108] "We admonish all future offenders that a defense of innocent or unknowing use of marijuana will not overcome a permissive inference of wrongfulness unless and until such defense is found sufficiently credible to be contrary to and overcome such inference. Any other conclusion . . . would permit future offenders a windfall from the introduction of perjured of otherwise absurd testimony." United States v. Douglas, 22 M.J. 891, 895 (A.F.C.M.R. 1986) (Raby, J., concurring), *aff'd*, 24 M.J. 129 (C.M.A. 1987) (summary disposition), *cert. denied*, 108 S. Ct. 83 (1987).

[109] United States v. Ford, 23 M.J. 331 (C.M.A. 1987); United States v. Mance, 26 M.J. 244 (C.M.A. 1988).

[110] R. Willette, *Oral Ingestion of Cannabis Products*, (Dec. 1987) (unpublished manuscript). Marijuana must be heated to at least 300 degrees Fahrenheit to activate the tetrahydrocannabinol, the major psychoactive ingredient of marijuana. Boiling marijuana in water at 212 degrees Fahrenheit is insufficient.

[111] *See, e.g.*, United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984).

accused's conduct.[112] If the accused truly does have a good military character, however, the trial counsel will not have any "ammunition" with which to cross-examine or rebut. In such a case, the trial counsel can cross-examine the defense character witnesses concerning their lack of knowledge of the accused's "off-duty" activities and lack of knowledge of whether the accused actually used the drugs as charged. The trial counsel can also argue in closing that good duty performance does not preclude the conclusion that the accused used drugs, citing any number of sports personalities who are proficient at their sport, yet use drugs. The trial counsel must refocus the fact-finder's attention on the scientific evidence conclusively establishing the accused's guilt.

If the accused raises any of several of the above defenses, the trial counsel may wish to offer the testimony of an expert witness to rebut either the accused or a defense expert witness. If so, the trial counsel should consider designating the expert as a government representative under Military Rule of Evidence 615. Such designation would allow the government expert to remain at the trial counsel's table while other witnesses testify, including the accused and any defense expert. The expert's presence may facilitate later rebuttal testimony, and will allow the expert to provide immediate suggestions to the trial counsel in cross-examining defense witnesses.

Conclusion

When a trial counsel first learns that a commander is contemplating a court-martial based on a positive urinalysis, the trial counsel must carefully assess the case. An important initial consideration is the legal basis upon which the commander seized the accused's urine. A health and welfare inspection is frequently the legal basis, but probable cause and consent may also form the basis. The trial counsel must carefully examine the facts surrounding the urinalysis to ensure that the commander had a proper basis to conduct the urinalysis. If there was not a proper basis, the urinalysis results will be suppressed at trial, terminating the government's case against the accused.

A second important preliminary consideration is whether the urinalysis was properly administered in accordance with the requirements of Appendix E to Army Regulation 600–85. If errors in the administration of the urinalysis implicate the chain of custody, charges should not be preferred. Procedural errors not directly implicating the chain of custody do not mandate exclusion of the urinalysis results, but these errors may result in an acquittal if they cause the fact-finder to have a reasonable doubt about the chain of custody.

Weaknesses in the government's case, resulting from an improper basis for administering the urinalysis or an improperly conducted urinalysis, may cause the trial counsel to recommend administrative separation of the accused, rather than court-martial.

After the decision is made to proceed to court-martial, the trial counsel must begin preparing for trial. The trial counsel must decide how to prove use. Introduction of the laboratory reports alone is insufficient. The government must provide an additional basis upon which the fact-finder can conclude that the accused used the drug. This additional basis can be an expert witness, a stipulation, judicial notice, or some combination. The trial counsel will most frequently rely on an expert witness from the laboratory that tested the urine. The trial counsel will most often prove wrongfulness by relying on the fact-finder to draw a permissive inference of wrongfulness.

The trial counsel must also deliver, anticipate, and prepare for possible defenses: defective chain of custody, laboratory error, passive inhalation, unknowing ingestion, and the "good soldier" defense.

Contested urinalysis cases will continue to be difficult cases to prosecute successfully, because they almost always rely solely on circumstantial, uncorroborated scientific evidence. When new trial counsel are aware of the issues that frequently arise in such cases, urinalysis prosecution's become less difficult and more successful.

[112] *See* Mil R. Evid. 405(a), permitting cross-examination into relevant specific instances of conduct, when the witness has testified on direct examination as to reputation or in the form of an opinion as to the accused's character.

Judicial Notice In Urinalysis Cases

*Major Wayne E. Anderson**
Region Judge Advocate, 2nd Region, USACIDC

Introduction[1]

While the drug testing battle is being waged in private industry, the federal arena, and professional sports, the battle has virtually been won in the armed forces. No serious fourth amendment challenge remains to the military's authority to take urine samples from its soldiers, sailors, marines, and airmen.[2] The victory is a qualified one, however. While there is no challenge to the military's right to *obtain* a urine specimen, the ability to *prove* drug use in a criminal proceeding by using the results of a urine test is an entirely different battle.

There are two major obstacles to successful prosecution of urinalysis cases.[3] First, notwithstanding fairly detailed procedures in Appendix E, Army Regulation 600–85,[4] improper handling and breaks in the chain of custody at the unit level continue to be the major sources of in-court problems. The solution to these problems is education, diligence, and supervision of the unit personnel who administer the tests. The focus of this article is not on the chain of custody problem, but on the second problem: the problem of proof. How can a trial counsel prove the use of marijuana, employing the results of a urine test without spending an inordinate amount of time and money?[5]

This obstacle was recently complicated by the United States Court of Military Appeals in *United States v. Murphy*,[6] in which the court overturned a conviction based solely on a "paper case." This article begins by examining the *Murphy* decision as well as the laboratory reporting procedure that the court found incapable of interpretation. The article continues with a proposed formula for proving a urinalysis case based on judicial notice rather than expert testimony. Finally, this article presents alternative methods for proving a "paper case" that are related to, but distinct from, the judicial notice approach.

The *Murphy* Decision

In *United States v. Murphy*, the government attempted to prove marijuana use relying solely on a "paper case." The evidence consisted of the laboratory reports and chain of custody documents pertaining to the accused's urine specimen. The Court of Military Appeals found that the scientific principles concerning urine testing were not matters of "common sense" or "knowledge of human nature." The court said,

> The best that can be said is that the common experience in the military is that the urinalysis program is designed to somehow chemically identify drug abusers within the ranks. Such general knowledge or common experience, however, does not provide a rational basis for drawing any inference from these test results concerning the specific drug offense charged in this case.[7]

Based on the court's decision, the Navy promptly published a message alerting counsel that, absent expert testimony, a stipulation, or some other lawful substitute, they could not rely strictly on a "paper case" to prove marijuana use.[8] For a successful prosecution, the *Murphy* decision clearly required that a "paper case" be supported by "something else."

A cursory reading of *Murphy* indicates that the "something else" must be an expert who can explain urine testing procedures and scientific principles. A more thorough reading of the case, however, reveals that the court did not go that far. In *Murphy*, the government introduced a 22-page printout of data from the scientific tests that purportedly identified the accused as a drug user. Because documentation of this type is not self-explanatory, the court observed that "[s]uch evidence clearly needs in-court expert testimony to assist the trier of fact in interpreting it if it is to rationally prove that an accused used marijuana."[9]

The prosecutor in the *Murphy* case may have had nothing other than those voluminous reports and printouts to

---

*This article was written while the author was an instructor in the Criminal Law Division, TJAGSA.

[1] This article was sent to Captain (Dr.) William Bronner, Division of Forensic Toxicology, Armed Forces Institute of Pathology, on May 9, 1988 for technical review. The author requested that Captain Bronner review the article from a toxicologist's standpoint and to identify inaccuracies and overstatements. Captain Bronner's response, dated 13 June 1988, was of enormous help. He made several suggestions and corrections that have since been incorporated into the article. The reader should understand, however, that Captain Bronner's review of the article was limited to scientific and toxicological matters, not to legal issues. The article was also forwarded to the Criminal Law Division, Office of the Judge Advocate General, prior to publication. Major Gary Holland of that office provided several very useful comments and materials that were incorporated into the article. The author owes a debt of gratitude to Captain Bronner and Major Holland for their contributions to the article.

[2] *See e.g.*, Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

[3] This observation is based on the author's personal experience and, more importantly, on discussions with scores of trial and defense counsel who come to The Judge Advocate General's School for the Graduate Course and various short courses.

[4] Army Reg. 600–85, Alcohol and Drug Abuse Prevention and Control Program, Appendix E (3 Nov. 1986).

[5] Experts in the area of drug testing estimated that the total cost for preparation plus civilian expert fees in a typical case would range from under $1,000 to over $6,000. Hoyt, Finnigan, Nee, Shults, Butler, *Drug Testing in the Workplace—Are Methods Legally Defensible?*, 258 Journal of the American Medical Association, 504, at 509 (1987). The total cost for the military drug testing system, including collection procedures and legal and administrative costs, is almost $100 per sample. *Id.* at 508, citing, M.A. Peat, Ph.D., oral communication, (Oct. 22, 1986).

[6] 23 M.J. 310 (C.M.A. 1987).

[7] *Id.* at 311.

[8] *See* Message, Navy JAG, Military Justice Advisory 2–87, 301930Z Sep. 86.

[9] 23 M.J. at 312.

prove the case. The clear message from *Murphy* is that laboratory reports must be more "user friendly." DA Form 5180–R, Urinalysis Custody and Report Record, and the computer printout of a gas chromatography mass spectrometry test are difficult to understand and even more difficult to explain to a layman. The individuals best suited to interpret these reports are the laboratory experts responsible for preparing and maintaining them. Their explanations should be in the form of short, concise, conclusory statements. Indeed, Military Rule of Evidence 1006[10] specifically permits the summarization of such reports. Courts routinely admit into evidence laboratory reports containing conclusions that certain substances are controlled substances.[11] This is accomplished without resorting to an expert or accompanying documentation to explain the testing techniques or underlying scientific principles.

What role should lawyers play in influencing the way experts prepare their reports? Last year, while at The Judge Advocate General's School, Professor Paul Giannelli[12] made the poignant observation that lawyers' insistence on legally defensible scientific procedures and simplified explanations of complex scientific principles have, in many cases, driven the scientific community to improve its testing and reporting methods. A good example of this is the legal attacks on military urine testing that led to the formation of the Einsel Commission.[13] Reforms suggested by the Einsel Commission have resulted in the military developing what is arguably the best drug testing program in the United States.[14] Nevertheless, the reporting methods, as suggested by *Murphy*, remain cumbersome and difficult to understand. Counsel should take the initiative to ensure that laboratory technicians report their findings in language that can easily be understood by a nonscientist. One suggested format that tracks closely with the CID Laboratory Report (CID Form 72) is attached as an example at Appendix A.[15]

Possessing understandable laboratory reports is only the first step. In order to prove that an accused unlawfully used a controlled substance by relying on the presence of drugs or certain drug "metabolites" in his urine, a number of scientific principles and techniques not commonly known to laymen must be explained to the court. Expert testimony is certainly one way of doing this, but a close reading of *Murphy* suggests that an expert's testimony is not the only vehicle for explaining scientific principles and tests. The court stated, "Expert testimony interpreting the tests or *some other lawful substitute* in the record is required to provide a rational basis upon which the fact-finder may draw an inference that marijuana was used."[16]

What, then, are these "other lawful substitutes?" In its decision, the court suggested at least two: stipulations and judicial notice.

> We further note that the Government offered no expert testimony concerning the meaning of these test results in terms of marijuana use. Mil. R. Evid. 702, Manual for Courts-Martial, United States, 1984. Also, there was no stipulation by the parties as to the import of these test results. R.C.M. 811(a), Manual, *supra. Moreover, no judicial notice of any kind was taken by the military judge in accordance with Mil. R. Evid. 201 concerning these matters.*[17]

The problem with getting defense to stipulate is evident. The defense cannot be forced to stipulate, and they have little incentive to relieve the government of part of its burden of proof. Nevertheless, trial counsel should try to obtain defense stipulations, especially in cases when it is clear that the defense's theory of the case has nothing to do with the laboratory's handling and testing procedures.[18]

On the other hand, trial counsel does not have to obtain the defense's agreement in order to get the trial court to take judicial notice. Clearly, the Court of Military Appeals has opened the door to using judicial notice in support of a urinalysis case. The limits on judicial notice have yet to be defined.

A Formula for Providing Urinalysis Cases Through Judicial Notice

Taking judicial notice of scientific principles and techniques applying those principles is not a new idea.[19] "The principles underlying many scientific techniques, including

---

[10] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 1006 [hereinafter Mil. R. Evid.].

[11] Mil. R. Evid. 803(8) specifically provides that such documents are admissible as an exception to the rule against hearsay.

[12] Professor Giannelli is a professor of law at Case Western Reserve University School of Law, Cleveland, Ohio. Professor Giannelli is also a Army Reserve Component Officer and an Individual Mobilization Augmentee for the Judge Advocate General's School.

[13] On October 24, 1983, the Einsel Commission was formed and tasked by the Deputy Surgeon General to review drug testing operations and procedures to assess whether laboratory results were legally sufficient for use as evidence in disciplinary proceedings or for purposes of characterizing discharges. Review of Urinalysis Drug Testing Procedures: Report by a Panel of Army and Civilian Experts in Drug Testing Legal Issues for the Surgeon General of the U.S. Army, 1 (12 December 1983) [hereinafter Einsel Commission Report].

[14] *See infra*, text accompanying notes 50–56.

[15] This lab report format will be forwarded to the Surgeon General by Criminal Law Division, OTJAG, with a recommendation that it be adopted for use by Army drug testing laboratories.

[16] 23 M.J. at 312 (emphasis added).

[17] *Id.* at 311 (emphasis added).

[18] Defense counsel may find a stipulation of expected testimony more palatable than a stipulation of fact. A stipulation of expected testimony has several advantages: (1) it is easier to "sell" to a client; and, (2) defense counsel is not precluded from arguing that the stipulated testimony may be biased or inaccurate.

[19] P. Giannelli and E. Imwinkelried, Scientific Evidence, § 1.2 (1986).

radar,[20] intoxication tests,[21] fingerprints,[22] palm prints,[23] firearms identification,[24] handwriting comparisons,[25] and gate-flux magnetometers[26] have all been judicially recognized in this fashion."[27] The principles underlying the testing of urine samples for evidence of drug abuse are equally worthy of judicial notice.

The definition of judicial notice is set forth in Military Rule of Evidence 201(b):

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event, or (2) *capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.*[28]

Having defined the standard for judicial notice, the next step is to determine what facts necessary to the proof of a urinalysis case are "capable of accurate and ready determination."

Even though urine testing is a relatively new science, the technology is extremely advanced and the scientific validity of the techniques is beyond reasonable dispute. The "facts" essential to the proof of a urinalysis case fall into the category of being "capable of accurate and ready determination." They include: (1) after drugs have been ingested, inhaled or injected by a human, the body excretes the drug or drug metabolites, which are chemically altered forms of the drug, into the urine and feces; (2) these drugs and drug metabolites can be conclusively identified through a properly conducted radioimmunoassay (RIA) screening test followed by a gas chromatography/mass spectrometry (GC/MS) confirmatory test of urine samples; (3) screening levels established by the military minimize the possibility that the presence of drug metabolites in the urine results from the passive inhalation of marijuana smoke or the lawful or innocent ingestion of an uncontrolled substance that yields metabolites indicating illegal drug consumption.

The three assertions made above are not radical positions at all, but are generally accepted scientific principles "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The first observation is a simple statement of physiology that the human body produces certain identifiable metabolites when it metabolizes drugs. "Metabolize" simply means the chemical alternation of a substance that the body has ingested, inhaled or injected. "Metabolites" are the chemically altered forms of the drug for which the test is conducted. These metabolites, or in some cases the drug itself, are excreted by the human body. The second assertion is that scientific means are available for accurately detecting these drugs and drug metabolites in the urine. The third assertion is that the military's screening and confirmatory cutoff standards are high enough to minimize the possibility that lawful or passive ingestion or inhalation of a substance will result in drug or drug metabolite concentrations high enough to yield a "positive" result in a drug test. Each of these assertions will be discussed later in some detail. When these assertions are tied together they "explain" how a positive laboratory report (supported by a proper chain of custody) can establish guilt of unlawful drug use beyond a reasonable doubt.

The formula for proving a urinalysis case is a relatively simple four-step process. The last three elements of the formula, however, require the court to take judicial notice. Applying the formula to a routine marijuana use case, counsel would first introduce a properly authenticated chain of custody document, and a laboratory report or summarization of a laboratory report, under Military Rule of Evidence 803(8) to show that a sample of the accused's urine tested positive for the presence of THC metabolites at specific concentrations. Second, counsel would ask the court to take judicial notice that this metabolite is the by-product of an illegal substance, marijuana. The third step is for counsel to ask the court to take judicial notice that the testing procedure used to detect the metabolite (radioimmunoassay [RIA] screen followed by a gas chromatography/mass spectrometry [GC/MS] confirmatory test as stated on the lab report) is an accurate method of identifying THC metabolites. Finally, counsel *may* have to ask the court to take notice of the fact that, in scientific studies, drug metabolite concentrations in subjects who passively inhale marijuana smoke have been below what military screening standards would identify as "positive."

The critical issue is whether the courts will agree to take judicial notice of the last three elements of the formula. In the following sections, the article will attempt to establish that the state of the science in the area of urine testing is such that these principles can and should be judicially noticed. These principles, when logically advanced and coupled with a valid chain of custody document and laboratory report, are sufficient to prove most routine drug use cases.

---

[20] United States v. Dreos, 156 F. Supp. 200, 208 (D. Md. 1957); State v. Tomanelli, 153 Conn. 365, 370–71, 216 A.2d 625, 629 (1966) (cited in Giannelli and Imwinkelried, *supra* note 19 at 3).

[21] People v. Stringfield, 37 Ill. App. 2d 344, 346, 185 N.E. 2d 381, 382 (1962) (breathalyzer); State v. Miller, 64 N.J. Super. 262, 268–69, 165 A. 2d 829, 832–33 (App. Div. 1960) (drunkometer); People v. Donaldson, 36 A.D. 2d 37, 40, 319 N.Y.S. 2d 172, 176 (1971) (breathalyzer) (cited in Giannelli and Imwinkelried, *supra* note 19 at 3).

[22] *E.g.*, Piquett v. United States, 81 F.2d 75, 85 (7th Cir.), *cert. denied*, 298 U.S. 663 (1936); State v. Rogers, 233 N.C. 390, 397, 64 S.E.2d 572, 577 (1951); Grice v. State, 142 Tex. Crim. 4, 11, 151 S.W.2d 211, 216 (1941) (cited in Giannelli and Imwinkelried, *supra* note 19 at 4).

[23] *E.g.*, State v. Inman, 350 A.2d 582, 588–89 (Me. 1976) (cited in Giannelli and Imwinkelried, *supra* note 19 at 4).

[24] State v. Hackett, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (cited in Giannelli and Imwinkelried, *supra* note 19 at 4).

[25] *E.g.*, Adams v. Ristine, 138 Va. 273, 283, 122 S.E. 126, 128 (1924); Fenelon v. State, 195 Wis. 416, 428–29, 217 N.W. 711, 715 (1928) (cited in Giannelli and Imwinkelried, *supra* note 19 at 4).

[26] *E.g.*, United States v. Lopez, 328 F. Supp. 1077, 1085 (E.D.N.Y. 1971) (cited in Giannelli and Imwinkelried, *supra* note 19 at 4).

[27] Giannelli and Imwinkelried, *supra* note 19 at 3–4.

[28] Mil. R. Evid. 201(b) (emphasis added).

The identification of a sufficient concentration of drugs or drug metabolites in a urine sample is legal and competent evidence that the person who provided the urine specimen used the specific drug identified.

When marijuana or cocaine are inhaled, ingested or injected, the body, through the process of metabolism, begins to break down the toxic psychoactive compounds into nontoxic compounds. These compounds are metabolites. Several different types of metabolites may be produced during metabolism. Drug tests for marijuana and cocaine are designed to identify these metabolites, rather than the drugs themselves, because the drugs are rapidly metabolized in humans and very little of the unmetabolized drug is excreted.[29]

In some cases, the drug itself, rather than a metabolite of the drug, is identified during testing. Identifying the drug, rather than a specific metabolite, is preferred when there is a possibility that some other substance produces the same metabolite as the drug.[30]

When the drug testing technique identifies a by-product of the illegal drug rather than the drug itself, how can one be sure that the metabolite identified is not the by-product of some substance other than the illegal drug?

This concern was articulated by Professor Imwinkelried in the Legal Addendum to the Einsel Commission Report:

> Although the possibility seems remote, further research could show that there are other drugs that would yield positive results on both tests [RIA and GC] and that those other drugs are readily available to members of the armed forces. If later research established those propositions, my assessment might well change. . . .[31]

The experts cannot categorically exclude the possibility that some other substance elsewhere in the universe could produce a metabolite identical to the metabolite produced, for example, by THC, the major psychoactive ingredient of marijuana. The thousands of tests conducted before and since Professor Imwinkelried voiced his concern, however, have revealed no substance that yields the same metabolites as THC and, therefore, the existence of a mere possibility does not create a reasonable doubt.

To understand why a scientist can confidently say that a particular metabolite is the by-product of a specific drug, it is important to understand how the science of drug identification developed. Dr. Robert Willette explains that drug testing for marijuana (THC) began in the 1960's. Scientists tested urine and other body fluids of individuals after they smoked marijuana. Several metabolites were isolated and identified as by-products of THC. These metabolites were identified because they appeared in urine only after the subject smoked marijuana. Moreover, the organic structure of the metabolites identified are similar to that of the major psychoactive ingredient of marijuana, and their organic structure was consistent with what scientists knew about metabolic "routes."[32] Finally, thousands of tests have been conducted and nothing other than the psychoactive ingredient of marijuana has produced the metabolites that are identified during drug testing. Dr. Willette said,

> No known chemical crossreactant at the recommended sensitivity levels to the EMIT or other cannabinoid immunoassays has been reported. This is not so remarkable in light of the rather unique chemical structure of the cannabinoids, which occur only in cannabis. The structurally similar drugs nabilone and nantradol do not crossreact significantly even at concentrations above their therapeutic levels.[33]

Equally conclusive results can be obtained from testing for other drugs. For example, heroin, and only heroin, yields the metabolite 6-monoacetylmorphine[34] and only cocaine yields benzoylecgonine.[35] Moreover, in the case of LSD and phencyclidine, the drug itself, namely phencyclidine and lysergic acid diethylamide, are the "analytes" or substances analyzed during testing.[36]

The scientific community is in agreement over the validity of identifying drug use through the detection of specific drugs or drug metabolites in an individual's urine. In the case of THC, it is quite unique and produces a similarly unique metabolite, 9-carboxy-delta-9-tetrahydrocannabinol. Even when substances organically similar to marijuana have been tested, they did not produce metabolites that were confused with metabolites produced by THC. In the case of opiates, however, there is the possibility that lawful substances (e.g., poppy seeds) may produce small amounts

---

[29] *See* R. Foltz, *Analysis of Cannabinoids in Physiological Specimens by Gas Chromatography/Mass Spectrometry*, in Advances in Analytical Toxicology 125, 130 (R. Baselt ed. 1984), citing Wall and Perez-Reyes, *The Metabolism of Delta-9-tetrahydrocannabinol and Related Cannabinoids in Man*, 21 J. Clin. Pharm. 171S (1981); L. Hollister, H. Gillespie, A. Ohlsson, *Do Plasma Concentrations of Delta-9-tetrahydrocannabinol Reflect the Degree of Intoxication?*, 21 J. Clin. Pharm. 178S (1981); Hawks, *The Constituents of Cannabis and the Disposition and Metabolism of Cannabinoids*, in The Analysis of Cannabinoids in Biological Fluids 125 (R. Hawks ed.), NIDA Research Monogram 42, U.S. Government Printing Office (1982); R. Mechoulam, N. McCallum and S. Burstein, *Recent Advances in the Chemistry and Biochemistry of Cannabis*, 76 Chem. Revs. 75 (1976); S. Burstein, *A Survey of Metabolic Transformation of Delta-1-tetrahydrocannabinol*, Cannabinoid Analysis in Physiological Fluids (J. Vinson ed.).

[30] Letter from Captain William Bronner, see *supra* note 1. Captain Bronner wrote, "Drug analysis may involve identification of drugs and/or their metabolites. The possibility of alternate sources (other chemicals or legal substances) producing the analyte (the analyzed substance) of interest will sometimes determine whether it is preferable to analyze for a drug metabolite or the drug itself."

[31] Legal Addendum, Einsel Commission Report, *supra* note 13 at 19. The Legal Addendum was authored by Professor Edward J. Imwinkelried who was then a Professor of Law at Washington University School of Law, St. Louis, Missouri. Professor Imwinkelried is a former instructor at the Judge Advocate General's School. He is currently a Professor of Law at the University of California, Davis.

[32] Willette, *Cannabinoids*, Clinical Chemistry News, Dec 1983, at 1.

[33] *Id.* at 9.

[34] Memorandum from the Assistant Secretary of Defense, Health Affairs, for the Assistant Secretary of the Army, Assistant Secretary of the Navy, Assistant Secretary of the Air Force; Subject: Opiate Urinalysis Testing Levels, 4 August 1987. Standards for urinalysis testing are established by the Secretary of Defense and published through memoranda to the other service secretaries. *See also infra* note 36.

[35] Memorandum from the Assistant Secretary of Defense, Health Affairs, for the Assistant Secretary of the Army, Assistant Secretary of the Navy, Assistant Secretary of the Air Force; Subject: Drug Urinalysis Testing Levels [marijuana and cocaine,] 12 August 1986. *See also infra* note 36.

[36] Letter from Captain Bronner, *supra* note 1. Captain Bronner wrote, "The presence of 6-acetylmorphine, phencyclidine, bezoylecgonine, 9-carboxy-delta-9-tetrahydrocannabinol, and lysergic acid diethylamide in urine are indicative of heroin, phencyclidine, cocaine, marijuana and LSD use, respectively."

of the same metabolites as unlawful opiates. As a safeguard against a positive identification of a person who ingests poppy seeds, the military has established confirmatory test levels that are high enough to safeguard against the possibility that a lawful substance will result in a positive identification.[37]

In the *Murphy* case, Judge Sullivan noted that "there was no basis *in the record of trial* for the judge to rationally conclude that THC was not naturally produced by the accused's body or as a result of some other substance consumed by him."[38] An answer to Judge Sullivan's concern on this issue is readily available upon resort to scientific "sources whose accuracy cannot reasonably be questioned." That is to say, courts can and should take judicial notice that the THC metabolite identified through urine testing is produced by the human body through the metabolism of THC, the major psychoactive ingredient of marijuana. Had the court in *Murphy* taken notice of this fact, there clearly would have been a basis *in the record* to find that the accused consumed marijuana as charged.

Military drug testing procedures that include a radioimmunoassay screening test followed by a confirmatory gas chromatography/mass spectrometry test conclusively establish the presence of unlawful drugs and drug metabolites.

In this section, the propriety of taking judicial notice of the accuracy of drug testing *techniques* will be defended. As a collateral matter, the proper legal standard for assessing testing *procedures* will also be addressed. There is an important legal distinction between drug testing *techniques* and drug testing *procedures*. The scientific techniques, which are predicated on scientific principles, may be judicially noticed if they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The procedures or the mechanics of urine testing, on the other hand, are entitled to a presumption of administrative regularity. Stated differently, if the drug testing techniques are deemed worthy of judicial notice, courts should presume that the techniques were faithfully and accurately executed, absent a showing to the contrary.

The accuracy of drug metabolite identification techniques by the military should be judicially noticed. Experts agree that a properly conducted gas chromatography/mass spectrometry (GC/MS) drug test conclusively identified the principal metabolite of contraband drugs. The Legal Addendum to the Einsel Commission Report states:

> [The] GC/MS is widely accepted as an identification test. I discussed this issue during telephone conversations with Doctor Elsohly,[39] Doctor Simon,[40] and Professor Shapiro.[41] All three experts agreed that, standing alone, a positive result of a properly conducted GC/MS would be a sufficient identification of a contraband drug. In Doctor Elsohly's words, such an identification would be "unequivocal." Doctor Simon described the GC/MS as "an absolute method." For his part, Professor Shapiro stated that he considers himself one of the harshest critics of drug identification testing in the United States. Yet he opined that a properly conducted and evaluated GC/MS test would be an adequate identification. There appears to be a widespread consensus that the GC/MS is "the ideal confirmation method." 1 M. HOUTS, R. BASELT & R. CRAVEY, COURTROOM TOXICOLOGY Tetr–33 (1983).[42]

More recently, in a survey published in the *Journal of the American Medical Association,* several experts in drug testing were asked to rate testing procedures of various drugs on a scale of "1" (fully defensible against legal challenge) to "4" (unacceptable for legal defense). When asked to rate the "legal defensibility" of various tests and test combinations, the experts agreed that multiple procedure tests where the GC/MS was used as a confirmatory test, were

---

[37] *See infra* text accompanying notes 57–80.

[38] 23 M.J. 311–312 (emphasis added).

[39] Doctor Mahmoud A. Elsohly received his Ph.D. as a Pharmacist from the University of Pittsburgh in 1975. At the time of the Einsel Commission, he was Assistant Director, Research Institute of Pharmaceutical Sciences and Research Associate Professor, School of Pharmacy, University of Mississippi, and Director, National Institute of Drug Abuse (NIDA) Marijuana Project.

[40] Doctor Robert K. Simon received his Ph.D. in Analytical Chemistry and Toxicology from the University of Maryland in 1967. At the time of the Einsel Commission he was Director, Industrial Operations, American Medical Laboratories, Fairfax, Virginia, and a Consultant in Forensic Toxicology.

[41] Dr. Robert H. Shapiro was a Professor of Chemistry at the University of Colorado.

[42] Legal Addendum to Einsel Commission Report, *supra* note 13 at 16–17.

"fully defensible against legal challenge."[43] The survey specifically found, "The most defensible method was considered to be either the EMIT or RIA followed by GC/MS.[44] The Army typically uses the RIA screening test followed by the GC/MS.[45]

When one hears about an expert who has criticized the GC/MS, one should carefully examine the nature of the criticism. There are several different methods for conducting a GC/MS[46] and experts may criticize one method over another. Moreover, the experts who are critical of the GC/MS, may be addressing their criticism to the sensitivity of the particular method employed. To the toxicologist, the degree of sensitivity required may be much greater than the degree of sensitivity required by the military to establish simple use. For example, if the toxicologist is attempting to determine whether a person was under the influence of an intoxicant at a particular time, the sensitivity of the test may be critical. On the other hand, "[i]f the purpose of the GC/MS analysis is to confirm positive . . . urine screens, it is only necessary to reliably detect [a specific THC metabolite] at urine concentrations exceeding 20 ng/ml. Most GC/MS assays [analyses] can easily achieve this level of sensitivity, so that the analyst confronted with this task has considerable latitude in selecting specific procedures and techniques."[47] In conclusion, "[m]ost forensic experts believe that the GC/MS is the 'gold' standard.'"[48]

Recognition of the GC/MS as a scientific technique worthy of judicial notice has been suggested before. Professor Imwinkelried stated, "Not only are the underlying premises of both GC and MS valid; those premises are so well accepted in scientific circles that they are proper subject-matter for judicial notice under statutes such as Federal Rule of Evidence 201(b)(2)."[49]

Military urine handling and testing procedures are entitled to a presumption of administrative regularity absent a showing to the contrary. Even if the accuracy and reliability of the GC/MS test are judicially noticed, defense may contend that the test is only as good as the particular procedure employed in each individual case.[50] Defense counsel must do more, however, than simply allege that the procedure *may* have been improper. The presumption of administrative regularity is a "well-established rule of law that without a contrary showing, the presumption of regularity supports the official acts of public officials. As we presume regularity in the laboratory handling of the specimen absent a contrary showing, so the lack of a break in the chain of custody leads us to reject the defense assertion that the laboratory report . . . had no probative force."[51]

Indeed, the methodology that is required by military testing laboratories is "a prototype drug testing program" as described in the *Journal of the American Medical Association.* A "prototype" program should ensure that:

> (1) Appropriate chain-of-custody and accepted administrative and analytical controls with documentation are practiced in the laboratory. (2) All positive results are confirmed by documented methods. Most forensic experts agree that GC/MS is the "gold standard." (3) The laboratory participates in a proficiency and inspection program.[52]

The military program satisfies the need for a consistent and common methodology in the testing procedure and

[43] The table demonstrating the survey's findings is reproduced below. As the chart indicates, variations in validity are affected not only by the test used, but by the substance being tested.

	Single-Procedure Methods**					Multiple-Procedure Methods**										
	EMIT	RIA	TLC	GC	GC/MS	EMIT, RIA	EMIT, TLC	EMIT, GC	EMIT, GC/MS	RIA, TLC	RIA, GC	RIA, GC/MS	TLC, EMIT	TLC, RIA	TLC, GC	TLC, GC/MS
Amphetamines	3.9	3.9	3.8	3.4	1.7	3.7	2.6	2.2	1.0	2.7	2.2	1.0	2.8	2.8	2.3	1.2
Barbiturates	4.0	4.0	3.8	3.4	1.7	3.7	2.5	2.1	1.0	2.6	2.1	1.1	2.7	2.7	2.3	1.2
Benzodiazepines	4.0	4.0	3.8	3.5	1.7	3.8	2.5	2.1	1.0	2.6	2.2	1.1	2.7	2.7	2.4	1.2
Cannabinoids	3.9	3.9	3.7	3.6	1.7	3.7	2.6	2.3	1.0	2.7	2.3	1.0	2.7	2.7	2.5	1.2
Cocaine	3.9	3.8	3.7	3.4	1.7	3.6	2.5	2.1	1.0	2.5	2.1	1.0	2.5	2.5	2.3	1.2
Methaqualone	3.9	3.9	3.8	3.4	1.7	3.7	2.5	2.1	1.0	2.5	2.1	1.0	2.5	2.5	2.3	1.2
Opiates	4.0	4.0	3.7	3.5	1.7	3.6	2.5	2.1	1.0	2.6	2.1	1.0	2.7	2.7	2.3	1.2
Phencyclidine	3.9	3.9	3.8	3.4	1.7	3.6	2.5	2.1	1.0	2.6	2.1	1.0	2.6	2.6	2.4	1.2

*Scale: 1. fully defensible against legal challenge. 2. somewhat defensible. 3. difficult to defend in legal challenges. 4. unacceptable for legal defense.

**EMIT indicates enzyme multiplied immunoassay technique; RIA, radioimmunoassay; TLC, thin-layer chromatography; GC, gas chromatography; and GC/MS, gas chromatography/mass spectrometry. First procedure is a screen; second procedure is a confirmation.

[44] 258 JAMA at 507.

[45] Department of Defense Directive 1010.1 (Encl. 3) p. 3–2 (Dec. 28, 1984) [hereinafter DOD Dir. 1010.1]. The military is the largest user of the RIA as a screening test; it is used less frequently in the civilian workplace. 258 JAMA at 508.

[46] *See generally,* Foltz, *supra* note 29.

[47] Foltz, *supra note* 29 at 135.

[48] 258 JAMA at 509.

[49] Bleser and Imwinkelried, *Gas Chromatography—Mass Spectrometry (GC/MS),* 7 The Champion 6, Nov. 1983. Mil. R. Evid. 201(b) is identical to Fed. R. Evid. 210(b).

[50] *See id.* at 10.

[51] United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979).

[52] 258 JAMA at 509.

documentation of the procedure. Indeed, the military appears to be at the forefront of the drug testing programs in this area. The study appearing in the *Journal of the American Medical Association* reported that "No . . . consistent methodology or set of criteria has been established, thus far, for employee drug testing, *with the exception of the program established by the US military.*"[53]

The second recommended measure, using a screening test followed by a GC/MS confirmatory test, is standard military practice.[54]

Finally, the military participates in a rigorous proficiency and inspection program through "blind testing" conducted by the Armed Forces Institute of Pathology (AFIP) or by a laboratory that applies AFIP standards and has been approved by the Deputy Assistant Secretary of Defense (Professional Affairs & Quality Assurance).[55] As reported in the *Journal of the American Medical Association*, "In employee drug testing, only the US military currently requires comprehensive proficiency testing. Such testing programs are available for other laboratories, and may eventually be required by federal or state regulations."[56]

A good argument can be made that the military has the soundest drug testing procedures in the United States. At the very minimum, it is clear that a well established program is in place and a court should presume administrative regularity in the handling and testing of urine specimens absent a showing to the contrary.

Military screening standards and confirmatory test procedures minimize the likelihood that passive inhalation of marijuana smoke or ingestion of an uncontrolled substance will result in a "positive" urine test.

For the most part, military screening and confirmatory test levels are established only to ensure that the tests do not misidentify innocuous metabolites as illegal drugs or drug metabolities. Thus, the minimum quantity of each drug or drug metabolite that is detectable by the RIA and GC/MS assays dictates the lowest acceptable screening and confirmatory levels.[57] There are two exceptions to this rule. THC metabolites may be detected in urine as the result of passive inhalation of marijuana and opiate metabolites may be detected in urine as the result of lawful oral ingestion of poppy seeds.

To ensure the validity of drug use identification through urine testing, the military has erected screening and confirmatory levels high enough to ensure that those who have a relatively small quantity of a drug metabolite in their urine that *could* have resulted from lawful or passive ingestion are not identified as "positive."[58] The screening levels serve as a threshold. If a urine sample initially tests positive by the screen, then and only then is it tested further using the GC/MS. A specimen is identified as "positive" only if it also tests positive with the GC/MS. Thus, if the metabolite of a particular drug is identified in the urine after a positive screen *and* a positive confirmatory GC/MS, than a court *may* draw an inference that the person who provided the urine specimen unlawfully inhaled, injected or ingested the illegal substance.[59] The current screening level for marijuana is the equivalent of 100 ng/ml (nanograms per milliliter) of 9-carboxy-delta-9-tetrahydrocannabinol[60] and the confirmatory standard is 15 ng/ml (nanograms per milliliter).[61] The reason for the difference is that the screening tests like the RIA or EMIT (enzyme multiplied immunoassay technique) respond to several cannabinoids. The GC/MS is used to identify and quantify individual cannabinoids, usually the 9-carboxy-THC. Thus, if an RIA or EMIT assay gives a response equivalent to 100 ng/ml of 9-carboxy-THC, the actual concentration of 9-carboxy-THC may be somewhat less than 100 ng/ml.

The permissive inference that a positive urine test resulted from the *unlawful* inhalation, injection or ingestion of drugs may be drawn *even if* the accused introduces evidence suggesting that the metabolite is the by-product of an innocently inhaled or ingested drug, or something other than an illegal drug.[62]

The "Passive Inhalation" defense. The potential for an innocent person to test positive for cannabinoids after passively inhaling marijuana smoke has been the subject of several studies. Researchers have discovered the presence of cannabinoids from passive inhalation, *but* not in concentrations high enough to be deemed "positive" under the Army's screening standards.

---

[53] 258 JAMA at 508. The military's procedures are detailed in DOD Dir. 1010.1 (Encl. 3).

[54] *See supra*, note 45.

[55] DOD Dir. 1010.1 (Encl 4) para. C.

[56] 258 JAMA at 508.

[57] Telephone conversation with Captain (Dr.) William Bronner, Division of Forensic Toxicology, Armed Forces Institute of Pathology, Washington, D.C., on April 26, 1988.

[58] *See* Cohen, *Marijuana Use Detection: The State of the Art*, Drug Abuse and Alcoholism Newsletter 40, May 1983. Dr. Cohen stated:

> The 100 ng/ml cutoff point is considered too high by some authorities. . . . However, it has the advantage of practically eliminating the possibility of a false positive. It is true that some people who have smoked recently will not be detected, so that false negatives are likely. The 100 ng/ml level also rules out the possibility of the passive smoker being found positive. For legal purposes it seems preferable to set the cutoff level a little higher than a little lower. *Id.* at 41.

[59] *See* United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

[60] The shorthand term for this metabolite is "9-carboxy THC." This metabolite is commonly tested for by the GC/MS. *See generally*, Foltz, *supra* note 29 at 130.

[61] *See Memorandum, supra* note 35. These standards were telephonically confirmed as current by Captain William Bronner, *see supra* note 57.

[62] *See, Ford*, 23 M.J. 331 (C.M.A. 1987). A permissive inference of wrongfulness could be drawn from positive urine test showing marijuana use even though the accused introduced evidence undercutting that inference. Contradictory evidence overcomes the permissive inference only if it is credible, and credibility remains a question for the finder of fact.

One of the first reliable studies on passive inhalation of marijuana smoke was conducted by researchers at the University of North Carolina at Chapel Hill.[63] Three separate studies were conducted. In the first study, four smokers smoked two marijuana cigarettes in the presence of two non-smokers in an unventilated room that measured 8′ × 8′ × 10′. The subjects were confined in the room for one hour. This experiment was repeated several weeks later. All of the non-smokers' urine samples had drug levels below 20 ng/ml utilizing the EMIT assay.[64]

In the second study, four subjects smoked two marijuana cigarettes in the presence of two non-smokers in a medium sized station wagon. They remained in the station wagon for one hour after smoking began. The experiment was repeated several weeks later. One of the non-smoking subject's urine sample reached a drug level slightly above 20 ng/ml on the EMIT assay; the others were lower.

The third study tested the cumulative effect of repeated exposure to marijuana smoke. Four subjects simultaneously smoked one marijuana cigarette each in the presence of two non-smokers on three consecutive days. The subjects were confined in the small room used in the first study and the smoking subjects were instructed to inhale as little as possible to maximize the concentration of marijuana smoke in the air. Only one specimen taken from a non-smoking subject on the third day slightly exceeded the 20 ng/ml level. It is important to note that none of the subjects in these tests would have passed the military screening threshold of 100 ng/ml and, therefore, they all would have been considered "negative" samples.

An excellent survey of the passive inhalation studies was prepared by Dr. Robert E. Willette.[65] He summarizes the results of several different passive inhalation studies that have been reported to the scientific community in published articles or at national meetings. Perhaps the most severe exposure to marijuana smoke in the studies reported by Dr. Willette was during the study by the National Institute of Drug Abuse (NIDA).[66] In that study, five drug-free men with a history of marijuana use were selected as subjects. They remained drug free for 14 days prior to the study. Two experiments were conducted with a 13 day "washout" period between the tests. Both were conducted in an unventilated room that was approximately 7′ × 8′ × 7′ in size. Marijuana cigarettes provided by NIDA were smoked by a smoking machine.

In one experiment, eight marijuana cigarettes were smoked by a smoking machine over a one-hour period. Four were smoked in the first 15 minutes and the other half were smoked during the second half-hour. The experiment was repeated daily for six consecutive days. During the study 300 urine samples were collected and tested using the EMIT assay. The EMIT was calibrated at 20 ng/ml and 75 ng/ml. Of the 300 samples taken, only 23 were above the 20 ng/ml level. One subject, who was a daily marijuana user prior to the study, produced 12 of the 23 samples that were above 20 ng/ml. None was above 75 ng/ml.

In the other experiment, 16 marijuana cigarettes were smoked by a smoking machine in one hour. Eight were smoked in the first 15 minutes and the other half was smoked 30 minutes later. Goggles were worn to prevent eye irritation. This procedure was repeated daily for 6 consecutive days. Some 400 urine samples were collected. Each of the five subjects produced an average of 35 urine specimens that were higher than 20 ng/ml. The longest period of time in which a subject continued to test over 20 ng/ml was less than 3½ days after the last exposure. Eleven specimens exceeded the 75 ng/ml calibration EMIT level and five exceeded the 100 ng/ml EMIT calibration level. All of the samples that were over 75 ng/ml were produced 2–4 hours after exposure and never persisted over 10 hours. The specimens of each subject were also tested using the RIA screen and GC/MS. The highest levels for the GC/MS for each subject ranged from 12–35 ng/ml. Significantly, the highest test level for each subject by the RIA ranged from 41 to 91 ng/ml. "Under testing criteria used in military laboratories, none would have screened positive by RIA at 100 ng/ml."[67]

At the conclusion of the tests, four of the five subjects smoked one marijuana cigarette. All exceeded the 75 ng/ml calibration level 2–4 hours after smoking. They remained over the 75 ng/ml for at least 7 hours, and one subject remained over 75 ng/ml for 4 days. The peak GC/MS levels ranged from 19–152 ng/ml.[68]

The government generally will not have to request a court to take judicial notice of the studies and body of information available on passive inhalation. If the defense raises the issue of passive inhalation, directly or indirectly, counsel should be prepared to request the court to take judicial notice of the available data in this area. The court may agree to take notice that numerous studies have been conducted in the area of passive inhalation; that the subjects have been exposed to varying amounts of marijuana smoke under varying conditions to include small, unventilated rooms; that the THC metabolite has been detected in urine samples of subjects exposed to marijuana smoke; and that the drug levels discovered were under the 100 ng/ml RIA screening thresholds established by the military. The government should not ask the court to take notice that a person cannot passively inhale enough marijuana smoke to test positive using Army screening levels; the court should only take notice of the available data and be allowed to

---

[63] Perez-Reyes, Guiseppi, Mason and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 Clinical Pharmacology & Therapeutics 36, (July 1983).

[64] The EMIT, like the RIA, responds to THC metabolites in the urine sample. Telephone conversation, *supra* note 57; *see also, infra* note 65.

[65] Willette, Duo Research, Inc., *Passive Inhalation of Marijuana Smoke*, Dec. 1987 (unpublished).

[66] The results of this study are reported in Cone and Johnson, *Contact Highs and Urinary Cannabinoid Excretion after Passive Exposure to Marijuana Smoke*, Clinical Pharmacology & Therapeutics, at 247 (Sept. 1986); and, Cone, Johnson, Darwin and Yousefnejad, *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-Tetrahydrocannabinol*, Journal of Analytical Toxicology, at 89 (May/June 1987). An excellent summary of the study is reported by Willette, Duo Research, Inc., A Study on Chronic Passive Exposure to Marijuana Smoke (Dec. 1987) (unpublished).

[67] Willette, *supra* note 66 at 4.

[68] *Id.*

reach its own conclusion concerning the plausibility of the accused's story.[69]

More studies in this area can be expected, and counsel should be alert to the circumstances of the studies as well as the particular findings.

The Innocent Oral Ingestion defense. Another defense closely related to the passive inhalation defense is the "innocent oral ingestion," or marijuana brownie defense. As with passive inhalation, THC metabolites may appear in the urine after orally consuming marijuana.[70]

Unlike the passive inhalation studies, the levels of THC metabolites in the urine following oral ingestion are high enough to be recorded as positive tests. There are some important facts that counsel should understand to assist in attacking this defense. First, THC, the major psychoactive ingredient of marijuana, is not "free standing" in marijuana leaves. The THC is released when the leaves are heated (burned or baked) over 300 degrees Fahrenheit. Moreover, studies have shown that the THC metabolites are slower to appear in the urine, but last longer when the marijuana is eaten rather than smoked.[71] These factors, once judicially noticed, provide counsel with ammunition for cross-examination of the accused. As previously indicated, the presence of THC metabolites creates a permissive inference that the use of marijuana was unlawful. In *Ford*,[72] the accused was convicted of wrongful use of marijuana even though he claimed that his estranged wife had sabotaged him by mixing marijuana into his food. The court obviously found his explanation incredible.

The "Poppy Seed" defense. Most illegal drugs are derived from substances that are themselves illegal to possess or consume. Cannabis plants, the source of THC, are unlawful to use or possess. Similarly, coca leaves, the source of cocaine, are themselves unlawful to possess or consume.[73] Opiates, such as heroin, morphine and codeine, are derived from the poppy plant, and some lawful substances are also derived from the poppy plant. The most common poppy derivative is the common poppy seed. Thus, consumption of poppy seeds may result in the body producing the same metabolites as produced by illegal opiates.

It is important to understand, however, that large quantities of poppy plants must be processed to yield small quantities of heroin. The concentration of opiate metabolite producing compounds is substantially higher in the refined illegal derivative than in the natural, lawful form.

In a recent study, four subjects were tested for opiate metabolites after consuming poppy seeds.[74] Two experiments were conducted. In the first experiment, the subjects ate 25 grams of poppy seeds (about 12 teaspoons). In the second experiment they ate 40 grams of poppy seeds. The study concluded that "dietary poppy seeds can give a stong positive result for urinary opiate of several days duration that is confirmed by GC/MS analysis."[75] The highest level of morphine detected was in a urine sample taken between 3 and 6 hours after ingesting 40 grams of poppy seeds. In that sample, the highest morphine metabolite level was 2635 ng/ml and the highest codeine level was 45 ng/ml.[76] The highest level after 24 hours was 233 ng/ml for morphine and 15 ng/ml for codeine.[77] The Department of Defense (DOD) standard for confirming morphine, however, is 4,000 ng/ml and 2,000 ng/ml for codeine,[78] well above the levels recorded from poppy seed ingestion.

In a recent study commissioned by the Army and conducted by Professor Elsohly at the University of Mississippi, similar results were confirmed. In Professor Elsohly's study, four separate experiments were conducted using four adults. In each case study, poppy rolls containing two grams of poppy seeds were used. In the first study, one roll was eaten; in the second study, two rolls were eaten; and, in the third study, three rolls were eaten. In the fourth study, two rolls were eaten each day for four consecutive days. All urine samples were screened by the RIA and EMIT. Samples that screened above 150 ng/ml by the RIA were confirmed with the GC/MS. All samples were well below DOD confirmation levels. After consumption of three poppy seed rolls, several samples approached 300 ng/ml. The only samples that exceeded 300 ng/ml were those taken approximately four hours after ingestion or first voids. In the study in which two rolls were eaten each day for four consecutive days, no sample exceeded 400 ng/ml by the

---

[69] *See* P. Giannelli and E. Imwinkelried, Scientific Evidence, § 1.2 (1986). "Judicial notice extends only to recognizing the validity of the underlying principle and the validity of the technique applying that principle. A court should not judicially notice the proper application of the technique on a particular occasion because such a fact is not an *indisputable* fact capable of certain verification." *Id.* (citing Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. Ill. L.F. 1, 6–9).

[70] *See* Law, Mason, Moffatt, Gleadle, and King, *Forensic Aspects of the Metabolism and Excretion of Cannabinoids Following Oral Ingestion of Cannabis Resin*, J. Pharm. Pharmacol. 289, May 1984; Ohlsson, Lindgren, Wahlen, Agurell, Hoolister and Gillespie, *Plasma Delta-9-tetrahydrocannabinol Concentrations and Clinical Effects After Oral and Intravenous Administration and Smoking*, Clin. Pharmacol. Ther. 409, Sept. 1980; Willette, Duo Research, Inc., *Oral Ingestion of Cannabis Products*, December 1987 (unpublished).

[71] Willette, *supra* note 70 at 2.

[72] 23 M.J. 331.

[73] In a limited study at the Research Institute of Pharmaceutical Sciences toxicologists detected benzoylecgonine, the metabolite produced by cocaine, in urine samples of subjects who drank coca leaf tea. See M. Elsohly, D. Stanford, H. Elsohly, *Coca Tea and Urinalysis for Cocaine Metabolites* (Letter to the Editor), 10 Journal of Analytical Toxicology 256, (Nov.–Dec. 1986). The "Coca Leaf Tea Defense" was short lived, however, because coca leaves themselves are a controlled substance. The Federal Schedules of Controlled Substances specifically prohibits "Coca leaves and any salt, compound, derivative, or preparation thereof . . . except . . . decocainized coca leaves or extractions of coca leaves, which extractions do not contain cocaine or ecgonine." 21 C.F.R. § 1308.12(4).

[74] L. Hayes, W. Krasselt, P. Mueggler, *Concentrations of Morphine and Codeine in Serum and Urine After Ingestion of Poppy Seeds*, Clin. Chem. 806, June 1987.

[75] Hayes, Krasselt and Mueggler, *supra* note 74 at 808. The test results were actually reported in micrograms/liter (mg/L). In the article, ng/ml, which equates to mg/L, is used as the standard of measure to maintain consistency.

[76] *Id.*

[77] *Id.*

[78] *Memorandum, supra* note 34. *See also*, Affidavit, Roger L. Foltz, Northwest Toxicology, Inc., Jan. 29, 1988.

GC/MS. Indeed, the sample with the highest level of morphine was taken 4.5 hours after the subject ate three poppy seed rolls. The concentration of morphine in that urine sample was 954 ng/ml. Bear in mind, the DOD confirmation level is 4,000 ng/ml. Based on his study, Dr. Elsohly made the following finding. "Based on our study, it would be highly unlikely for an individual to test positive in the DoD drug testing program above the 300 ng/ml cutoff level as a result of normal ingestion of poppy seed rolls or bagels twenty-four hours after ingestion." [79]

In addition to testing for morphine and codeine metabolites, a new test has recently been adopted by the military that identifies a metabolite, 6-monoacetylmorphine, that is produced only by heroin. The confirmatory level for this metabolite is 10 ng/ml. [80]

In the final analysis, toxicologists have a sound basis for concluding that if morphine and codeine metabolite concentrations are above the established confirmatory levels, it is almost a certainty that the source of the metabolites is an unlawful opiate. Furthermore, if 6-monoacetylmorphine is detected in concentrations at or above 10 ng/ml, toxicologists will conclude that the source of the metabolites is heroin.

When the "poppy seed" defense is raised, counsel should request the court to take judicial notice of the Department of Defense confirmatory cutoff levels and the results of poppy seed consumption studies. The onus is then on counsel to convince the court, through cross-examination and argument, that the opiate metabolites result from the consumption or injection of illegal drugs, and not from the consumption of poppy cake.

Putting Scientific Principles Into Evidence—Applying Judicial Notice and Other Legal Methodologies of Proof

There is clearly a large body of virtually indisputable scientific knowledge in the area of urine testing. Nevertheless, the trial judge has great discretion in deciding whether to take judicial notice of a matter. Prudent counsel should request an article 39a session well in advance of court and, through a motion in limine, determine whether the military judge will take judicial notice of certain scientific principles. The three scientific principles counsel should request the court to judicially notice are: (1) the human body produces distinctive metabolites from the metabolism of certain drugs, and these metabolites or the drug itself is excreted into urine; (2) these drugs and drug metabolites are capable of conclusive detection; and (3) military screening standards are sufficiently high to avoid identifying as "positives," an individual who has ingested a lawful substances such as poppy seeds, or passively inhaled marijuana. A fourth principle that is implicitly addressed in the section on passive inhalation, [81] is that metabolite concentrations in urine have a relatively short life. This principle may become relevant if the defense directly or indirectly asserts that the presence of drug metabolites is a residual of preservice drug use or is the result of passive inhalation days or weeks before the urine test. [82]

In any event, counsel should prepare in writing the precise matters they want the trial judge to judicially notice. In many cases, the article 39a session will force the defense to clearly articulate the issues to be litigated and may provide the stimulus for defense counsel to stipulate to matters that are not really at issue.

As an alternative to judicial notice, a local drug and alcohol counselor or a military doctor may be used as an expert for purposes of explaining the basic underlying scientific principles and procedures of the Army's drug testing program and attesting to its reliability. In qualifying such an "expert" to testify, counsel should turn to the court's analysis in *United States v. Mustafa.* [83] In *Mustafa,* the Court of Military Appeals noted that under Military Rule of Evidence 703 the threshold for determining whether a person is an expert has been lowered. The Rule "requires only that the proffered witness have some specialized knowledge as a result of experience or education. No longer are parties to litigation 'limited to [the use of] experts in the strictest sense of the word.' " [84] Even though the local military doctor or drug and alcohol counselor is not an expert in the field of toxicology, they are experts in related fields and, as such, may be qualified to testify about the state of the science in urine testing. Often these experts have attended seminars and courses that have provided instruction on military testing procedures and the scientific basis of the various testing methods.

If a *Mustafa* expert is not available, counsel should consider creating their own. They should urge a local military doctor or drug abuse counselor to obtain the education and training necessary to qualify as a *Mustafa* expert in the area of urine drug testing techniques and principles.

In connection with the use of a *Mustafa* expert, counsel should consider using the learned treatise exception to the hearsay rule in order to make the *Mustafa* expert's testimony more complete and more convincing. [85] The court may take judicial notice that the publication is a "reliable authority" or counsel may prove the reliability of the publication through the testimony of the experts. Proving

---

[79] Dr. Elsohly's study is entitled *The Impact of Poppy Seed Ingestion on Positive Urine Tests for Opiates.* The study was commissioned by the Surgeon General for use in assessing the viability of military testing levels. Major Gary Holland, Criminal Law Division, OTJAG, kindly provided me a copy of Dr. Mahmoud A. Elsohly's final report. Currently, there is no plan to publish the study.

[80] *Memorandum, supra,* note 34.

[81] *See* text accompanying notes 57–72.

[82] Counsel should be aware, however, that preliminary studies suggest that THC metabolites may remain in the system of heavy marijuana users for several days, even weeks. Captain Bronner wrote, "While one time use of marijuana is rarely detectable for more than a few days, long term use may be detectable for several weeks after drug use is discontinued. Dr. Willette reported (Syva Monitor, vol. 4, no. 1, 1986) positive test results for one chronic user 11 weeks after marijuana use had ended." Letter *supra* note 1. In challenging this defense, counsel should investigate to determine whether the accused has taken prior urinalysis tests or perhaps a preinduction urine test.

[83] 22 M.J. 165 (C.M.A. 1986).

[84] *Id.* at 167–68 (quoting Soo Line R. Co. v. Fruehauf Corp., 547 F.2d 1365, 1377 (8th Cir. 1977)).

[85] Mil. R. Evid 803(18). The learned treatise exception permits statements from published treatises, periodicals or pamphlets to be used in support of direct examination. The pertinent parts of the treatise may be read to the court members; the document itself may not be taken into the deliberation room.

the reliability of the publication may be accomplished by asking the *Mustafa* expert, who may be a doctor or professional affiliated with the Alcohol and Drug Abuse and Prevention program, whether the publication in question is, indeed, a "reliable authority."[86] After counsel has established the reliability of the treatise through judicial notice or expert testimony, the witness or counsel may read selected passages from the publication to the court. A potential disadvantage of using the learned treatise exception to the hearsay rule is that it may be difficult to isolate passages in publications that clearly state the scientific principles counsel must establish to prove their case. Generally speaking, the target audience of these publications is other professionals and, as a result, the terminology is often cumbersome and difficult for nonscientists to understand.

Conclusion

Trial counsel, armed only with powers of persuasion and a conclusory lab report that reports the presence of a contraband drug or drug metabolite in the accused's urine, should be able to prove that an accused ingested an illegal drug.

This is not to say that there is no longer a need for experts in urinalysis cases. In close cases, counsel may decide, as a matter of tactics, to call an expert who will be more persuasive than a simple verbal assertion that has been judicially noticed. Moreover, when metabolite levels are marginally positive or some unique defense is raised by the defense, an expert's explanation may be more critical.

In the "routine" case, however, counsel may wish to conserve funds and time by using the "formula" set out in this article. Indeed, counsel may further use this article as a reference source. While the author has not provided an exhaustive listing of scientific references and studies, those cited are reputable and representative of the findings and conclusions in this specialized discipline. If the judge declines to take judicial notice of the matters requested, counsel should attempt to use local personnel assets to create their own "*Mustafa*" expert who, with the help of the learned treatise doctrine, may prove the case without resort to an expensive outside expert who is often tied to a busy schedule.

[86] *Id.*

Appendix A

Name of Laboratory:

Unit Specimen Number: SSN of Individual:

Laboratory Accession Number:

The following test procedures and findings apply to the above identified urine specimen:

1. The radioimmunoassay (RIA) initial screen test for this sample was conducted on _____ (date).

2. The RIA test revealed that the specimen was positive for (marijuana) (cocaine) (_____) metabolites.

3. The RIA test was confirmed by a gas chromatography/mass spectrometry (GC/MS) on _____ (date).

4. The GC/MS confirmatory test revealed that the specimen was positive for the drug (metabolite) (11-nor-9-carboxy-delta-9-tetrahydrocannabinol) (benzoylecgonine) (_____) at a level of _____ nanograms per milliliter (ng/ml).

5. The above metabolite identified by the GC/MS is produced by the metabolism of (marijuana) (cocaine) (_____), a controlled substance.

Certification

I certify that I am a laboratory certifying official, that the laboratory results summarized above and the attached chain of custody documents and instrument printouts were correctly determined and accurately recorded by proper laboratory procedures as established by the Department of Defense and The Surgeon General of the Army. I further certify that I am the official records custodian of this laboratory, that this form is a summarization of the attached official records, which are prepared in the regular course of business of this laboratory, and which are true and accurate copies of the originals that are kept in the official files of this laboratory and maintained by me.

_____ (Date)

_____ (Name and Rank)

Editorial Note

The following articles by Major Earle Munns and Ms. Margaret Patterson address the recently published Army Regulation 215–4, Nonappropriated Fund Contracting. *This regulation announces a new policy concerning bid protests of nonappropriated fund acquisitions. Under this policy, the bid protest procedure for an acquisition conducted by a nonappropriated fund (NAF) contracting officer differs from the procedure used if an appropriated fund (APF) contracting officer performs the acquisition.*

Major Munns argues that this distinction is unnecessary. He contends that the fact that an appropriated fund contracting officer makes the acquisition does not change the nature of the acquisition, and disappointed bidders should not be able to protest to the General Accounting Office (GAO) and the General Services Board of Contract Appeals (GSBCA). Major Munns believes that all protests involving Army NAF procurements should be resolved through an exclusive agency procedure.

Ms. Patterson states that the distinction in AR 215–4 is merely reflective of post-CICA Comptroller General decisions involving nonappropriated fund procurements. She disagrees with Major Munns' interpretation of the GAO decisions, and maintains that establishment of an exclusive agency procedure for handling all nonappropriated fund bid protests would not prevail over Comptroller General decisions.

The Army NAF Protest Procedure: Time for a Change

Major Earle D. Munns, Jr.
Instructor, The Judge Advocate General's School

Introduction

The Department of Army recently published Army Regulation (AR) 215–4, *Nonappropriated Fund Contracting*,[1] which supersedes chapter 21 of AR 215–1 and Department of Army Pamphlet 215–4.[2] It combines policy and procedural guidance for all acquisitions conducted by Army nonappropriated fund instrumentalities (NAFI's) into one comprehensive regulation. In addition to combining previous acquisition guidance, it also changes acquisition policy. The regulation applies to all Army nonappropriated fund (NAF) contracting activities, except the Army-Air Force Exchange Service, the U.S. Army Reserve, the Army National Guard, and the Chaplain's Fund.

One of the most significant changes it contains is a new policy for filing and processing "disappointed bidder" protests.[3] Under this policy, the bid protest procedure for an acquisition conducted by a nonappropriated fund (NAF) contracting officer differs from the procedure used if an appropriated fund (APF) contracting officer performs the acquisition.

The regulation prescribes an exclusive agency procedure for handling the protest when an Army NAF contracting officer issues the solicitation.[4] The NAF contracting officer must attempt to resolve protests through conferences with the protestor. If this is unsuccessful, the contracting officer must issue a written final decision that may be appealed to the installation commander or to his or her designee. No further appeals are permitted beyond the installation commander.

Conversely, when an APF contracting officer issues the solicitation, the procedures set forth in Federal Acquisition Regulation (FAR) Subpart 33.1, and its supplements apply.[5] The procedures set forth in FAR 33.1 encourage resolution of the protests by the agency, but permit protests to the General Accounting Office (GAO)[6] in accordance with GAO regulations, and protests to the General Services Board of Contract Appeals (GSBCA) in accordance with GSBCA Rules of Procedure.

The decision to permit protests to the GAO and the GSBCA when an APF contracting officer issues a NAF solicitation does not serve the best interests of the Army. Instead, the better course is to prescribe an exclusive agency procedure to resolve *all* protests involving Army NAF procurements.

Comptroller General Protest Decisions

The new protest policy permitting GAO and GSBCA involvement when an appropriated fund contracting officer conducts a NAF acquisition is based on an interpretation of the Comptroller General's decision in *Artisan Builders*.[7] Presumably, this policy is supported by the Comptroller General's statement in *Artisan Builders* that when APF contracting officers accomplish acquisitions for NAFI's, the Comptroller General acquires bid protest jurisdiction over the procurement.

A further assumption is that the Comptroller General correctly interpreted its bid protest jurisdiction under the Competition in Contracting Act. Therefore, why not tell the Army NAF contracting community to follow already established FAR bid protest procedures?

An examination of the bid protest jurisdiction of the Comptroller General under the Competition in Contracting Act, and an analysis of the ruling in *Artisan Builders* leads to the conclusion that an exclusive agency procedure to resolve all bid protests *is permissible*. As long as the APF contracting officer acts solely as an agent of the NAFI, and uses only AR 215–4 acquisition procedures, the acquisition

[1] Army Reg. 215–4, Nonappropriated Fund Contracting (30 Mar. 1988) [hereinafter AR 215–4].

[2] *Id.* para. 1.

[3] *Id.* para. 4–40.

[4] *Id.* para. 4–40a(1).

[5] *Id.* para. 4–40a(2).

[6] The GAO is also referred to in this article as the Comptroller General. The Comptroller General will accept the protests forwarded to its offices under the protest provisions of the new NAF contracting regulation. *See* 4 C.F.R. § 21.11 (1988):

§ 21.11 Nonstatutory Protests

(a) The General Accounting Office may consider protests concerning sales by a federal agency or procurements by agencies of the government other than federal agencies as defined in § 21.0(c) if the agency involved has agreed in writing to have its protests decided by the General Accounting Office.

(b) All of the provisions of these Bid Protest Regulations shall apply to any nonstatutory protest decided by the General Accounting Office except for the provisions of § 21.6(d) pertaining to entitlement.

[7] AR 215–4, para. 4–40*a* was drafted in response to *Artisan Builders, Inc.*, Comp. Gen. Dec. B–220804 (24 Jan. 86), 86–1 CPD ¶ 85 (hereinafter *Artisan Builders*). *See* Patterson, *The New NAF Contracting Regulation*, The Army Lawyer, Mar. 1988, at 12.

will be outside the bid protest jurisdiction of the Comptroller General.

The Comptroller General sustained the protest of unsuccessful offeror Artisan Builders even though the acquisition was conducted using nonappropriated funds. In the case, the Comptroller General stated that its authority to decide bid protests is based on whether the procurement is conducted by a federal agency, and is not dependent on the nature of the funds involved.[8]

In *Artisan Builders*, the Comptroller General acknowledged that its bid protest regulations do not provide it with jurisdiction over NAF acquisition protests.[9] Nevertheless, the Comptroller General asserted jurisdiction because the procurement was conducted by the Williams Air Force Base APF contracting officer, who used FAR procedures and clauses. Thus, the Comptroller General viewed the facts of the protest as a violation of procurement statutes and regulations (the FAR) by a federal agency (the Air Force).

This "two-prong" jurisdictional approach by the Comptroller General should be the focus of any interpretation of *Artisan Builders*. The Comptroller General recognized specific limits on its bid protest jurisdiction, stating there must be: (1) an alleged violation of procurement statutes or regulations; (2) by a federal agency.[10]

Under this reasoning, if the Air Force NAFI had accomplished the procurement using NAF contracting forms and procedures, the Comptroller General would not have had jurisdiction to consider the protest.[11] The first prong would not be satisfied as there would not have been an allegation of *a violation of the FAR*. Under the provisions of the new Army NAF contracting regulation, NAF procurements by appropriated fund contracting officers must follow NAF contracting procedures, and *cannot use FAR procedures and clauses.*[12] Thus, Army policy prevents the Comptroller General from assuming jurisdiction *ab initio.*[13]

Moreover, the Comptroller General in *Artisan Builders* chose to ignore the application of the Competition in Contracting Act's jurisdictional definition of "federal agency" to this particular NAF procurement. Examination of the legal status of the Air Force NAFI in question should have led to the conclusion that the procurement was *by and for* a DOD NAFI, not a federal agency. The Comptroller General did not address the agency relationship between the Air Force NAFI and the APF contracting officer. The solicitation was, after all, issued by an Air Force NAFI, not the Air Force. The construction services purchased were for the NAFI, not the agency. The mere use by the NAFI of APF contracting support should not change the ultimate conclusion that this procurement was conducted by a NAFI, not a federal agency.[14] Hence, the second prong of the Comptroller General's bid protest jurisdiction was not satisfied in *Artisan Builders.*

The key criticism is that the *Artisan Builders* decision did not properly address the two prongs of the Comptroller General's limited jurisdiction under the Competition in Contracting Act. Both prongs must be satisfied before the Comptroller General can assert bid protest jurisdiction over an acquisition, and in *Artisan Builders* the second prong, that the procurement was by a federal agency, was clearly not met. Even if the Comptroller General's analysis of its bid protest jurisdiction in *Artisan Builders* is presumed to be correct, the case should be narrowly interpreted and not form the basis for a new Army policy on NAF procurement protests. The argument to ignore *Artisan Builders* is buttressed by the uncertainty in this area of the law created by subsequent Comptroller General decisions.[15] After the *Artisan Builders* ruling, for example, the Comptroller General specifically reviewed whether its bid protest jurisdiction

---

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id. See also* Comp. Gen. Dec. B–218198.6, 85–2 CPD ¶ 640 (GAO held that its authority to decide bid protests is based on whether the procurement is conducted by a federal agency and is not dependent on whether appropriated funds are involved. In the case, the procurements were conducted by Government Services Administration travel management centers pursuant to the FAR and the Federal Property and Administrative Services Act (FPASA), 40 U.S.C.A. § 759 (West Supp. 1988). The agency approach was (erroneously) based on the belief that the Comptroller General's "settlement authority" bid protest jurisdiction was in issue. The Comptroller General did not address whether GSA travel centers are "federal agencies.").

[12] AR 215–4, para. 3–11.

[13] In a case decided on other grounds, the Comptroller General in dicta addressed the jurisdictional prong "violation of a procurement statute or regulation." *See Gino Morena Enterprises,* Comp. Gen. Dec. B–224235 (5 Feb. 87), 87–1 CPD ¶ 87 [hereinafter *Gino Morena*] (Comptroller General bid protest jurisdiction extends to a Lackland Air Force Base concession agreement awarded by the Basic Military Training School (BMTS) Commander. In the case, there was no disagreement that BMTS is a federal agency. The Air Force contended that the Comptroller General was without authority to decide the protest because the agreement was not a procurement contract. The Comptroller General denied the Air Force position. It did not matter how the arrangement was styled, the concession agreement was for services needed *by the agency* (BMTS) and thus constituted a procurement contract. In other words, this was a federal agency procurement.) This decision may lead the reader to conclude that any acquisition by a federal agency involves a procurement contract, thus satisfying jurisdictional prerequisites. Even if the Comptroller General is correct, this does not settle the "violation of procurement statute or regulation" jurisdictional prong discussed herein. The teaching point of *Gino Morena* and *Artisan Builders* is that the two jurisdictional prongs are interdependent. If the protest deals with a federal agency procurement, then the agency cannot successfully argue it did not violate procurement regulations. Conversely, the Comptroller General has never held or otherwise stated (in dicta) that a purchase by a DOD NAFI using NAF procedures involves a procurement contract.

[14] *See* Comp. Gen. Dec. B–229611.2 (8 Dec. 87), 87–2 CPD ¶ 568. (The Comptroller General dismissed the bid protest, holding that, even though the proposed contract was to be financed with Department of Housing and Urban Development appropriated funds, the solicitation was issued by the Colville Indian Housing Authority, which is clearly not a federal agency).

[15] *See* Comp. Gen. Dec. B–227811 (8 Oct. 87), 87–2 CPD ¶ 345. (The Comptroller General held that the Bonneville Power Administration comes within the statutory definition of a federal agency subject to CICA, and is therefore subject to the Comptroller General's bid protest jurisdiction. Bonneville's argument that its procurements are not subject to the Comptroller General's protest jurisdiction because Bonneville does not use appropriated funds was determined without merit. In fact, the funds in question are generated from rate payers and are not nonappropriated funds, but rather are a "continuing appropriation"); *see also* 64 Comp. Gen. 756 (1985), 85–2 CPD ¶ 146 (The Comptroller General's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949. Based on a review of CICA and its legislative history, the term "federal agency" includes wholly owned government corporations such as the Tennessee Valley Authority.).

extended to DOD NAF procurements, and concluded that it did not.[16]

Comptroller General Bid Protest Authority

Prior to enactment of the Competition in Contracting Act[17] and implementing bid protest regulations,[18] the Comptroller General decided bid protests based solely on its authority to adjust and settle government accounts.[19] There existed no separate statutory authority permitting the Comptroller General to decide bid protests. Accordingly, the Comptroller General's authority extended only to protests involving appropriated funds.

The Competition In Contracting Act provided statutory authority for the Comptroller General to decide bid protests, which were defined as: "A written objection by an interested party to a solicitation by an (sic) Federal agency for bids or proposals for a proposed contract for the procurement of property or services, or a written objection by an interested party to a proposed award or the award of such a contract."[20] In simpler terms, under the Competition In Contracting Act and the implementing Bid Protest Regulations,[21] the Comptroller General considers protests that involve solicitations issued by or for *federal agencies* for the procurement of property or services.[22] Thus, a disappointed bidder must allege that a federal agency violated procurement rules. Is an Army NAFI a federal agency for purposes of this statute?

For purposes of the Comptroller General's bid protest authority, "federal agency" has the same meaning found in the Federal Property and Administrative Services Act of 1949,[23] which defines the term as including "any executive agency or any establishment in the legislative or judicial branch of the government."[24] The Comptroller General restates this definition in its Bid Protest Regulations: " 'Federal agency' means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives and the Architect of the Capitol and any activities under his direction."[25]

Army NAFI's, which are created by the Army,[26] do not appear to be "federal agencies" for purposes of the Comptroller General's bid protest authority. They are not an executive department or independent establishment in the executive branch but rather exist and operate solely by direction of the Secretary of the Army.[27] They are not a wholly owned government corporation. Accordingly, Army NAF procurements are not subject to the Comptroller General's Bid Protest statutory jurisdiction.

In a recent unpublished opinion,[28] the Comptroller General agreed with this conclusion, stating that its Bid Protest Regulations provide that procurements by "nonappropriated fund activities" are beyond its protest jurisdiction, and that the term "nonappropriated fund activity" refers to the entities such as Department of Defense (DOD) NAFI's. Stating in the opinion that DOD NAFI's are not created by Congress, but instead by military departments themselves, the Comptroller General held that DOD NAF procurements "are beyond our bid protest jurisdiction, since they are not 'federal agencies.' "[29] An Army NAFI is therefore not a federal agency for the purposes of the Comptroller General's statutory protest jurisdiction. Will the purchase of goods or services by an Army NAF using NAF procedures permit a protestor to allege a violation of procurement statutes or regulations?

The Comptroller General's statutory protest jurisdiction requires that a disappointed bidder allege more than that a federal agency did something (in error). The Comptroller General's bid protest jurisdiction is limited by the Competition In Contracting Act to those protests also alleging "a violation of a procurement statute or regulation."[30] The question then becomes whether the jurisdictional concept of "violating a procurement statute or regulation" extends to Army NAF procurements using *only* Army NAF procurement policies and procedures. The Comptroller General has not yet decided this question. The legislative history[31] of the Comptroller General's statutory bid protest authority suggests that the answer is "no". In any event, the Army decision to have NAF protests decided by the Comptroller General is premature.

---

[16] Comp. Gen. Dec. B–225959 (6 Feb. 87) [hereinafter B–225959].

[17] 31 U.S.C.A. §§ 3551–56 (West Supp. 1988) [hereinafter Competition In Contracting Act].

[18] 4 C.F.R. part 21 (1988) [hereinafter GAO Protest System]; *see* Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide* (3d ed. 1988).

[19] 31 U.S.C. § 3526 (1982); *see* Cibinic and Lasken, *The Comptroller General and Bid Protests*, 38 Geo. Wash. L. Rev. 349 (1970).

[20] Pub. L. 98–369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1199 amended Pub. L. 99–145, Title XIII, § 1304(d), Nov. 8, 1985, 99 Stat. 742 [*codified at* 31 U.S.C.A. § 3551(1)(3) (West. Supp. 1988)] [hereinafter Pub L. 98–369].

[21] GAO Protest System, *supra* note 18.

[22] GAO Protest System, *supra* note 18 at § 21.1; *see* Comp. Gen. Dec. No. B–229611.2 (8 Dec. 1987), 87–2 CPD ¶ 568.

[23] 40 U.S.C.A. § 472(b) (1985).

[24] *See* 31 U.S.C.A. § 3551(3) (West Supp. 1988).

[25] GAO Protest System, *supra* note 18 at § 21.0(c).

[26] Army Reg. 215–1, Morale, Welfare, and Recreation—Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities, Chapter 1, (20 Feb. 1984).

[27] While NAFI's do not fall within the definition of "federal agency" in the Competition in Contracting Act, they are federal instrumentalities for most other purposes. In particular, NAFI's share the sovereign immunity of the Federal Government. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942).

[28] B–225959, *supra* note 16.

[29] B–225959, *supra* note 16. The facts in the case did not involve a NAF acquisition conducted by an APF contracting officer. As with other GAO opinions, the precedential value of this case is the interpretation of the Comptroller General's statutory protests jurisdiction.

[30] *See* 31 U.S.C.A. § 3552 (West Supp. 1988).

[31] *See* 1984 U.S. Code Cong. and Admin. News 697 [hereinafter Leg. Hist.]; *see also* H.R. Rep. No. 98–861, 98th Cong., 2d Sess. 1435 [hereinafter Conference Committee].

AR 215–4 also requires that *all* Army NAF procurements be processed using the procedures of that regulation and any future directives issued by the United States Army Community and Family Support Center NAF contracting officer. Although APF contracting officers are authorized to assist in NAF procurements,[32] they are not permitted to use FAR procedures or the DOD or Army FAR supplement procedures in NAF procurements. Instead, they must assist in the procurement using only the Army regulatory procedures.[33] This policy directive appears to be directed at the jurisdictional prong "violation of a procurement statute or regulation." It would logically buttress the argument that the APF contracting officer is a mere agent of the NAFI. Thus, the nucleus of a defense to the Comptroller General's protest jurisdiction over NAF procurements is formed. Unfortunately, the other policy decision, which permits protests to the Comptroller General when the APF contracting officer conducts the acquisition, would seem to vitiate this defense. Is this defense valid as evidenced in language of Competition In Contracting Act provisions and legislative history?

The Competition In Contracting Act was designed to increase the use of competition in government contracting and to impose more stringent restrictions on the awarding of noncompetitive contracts.[34] "Full and open" became the agency standard for competition, and the primary enforcement mechanism was a strengthened bid protest system.[35]

Congress amended the Budget and Accounting Act of 1921[36] to provide the Comptroller General with a statutory authority for its bid protest function. The framers of the Competition In Contracting Act intended that the GAO Protest System enforce the mandate for competition.[37] The system permits the Comptroller General to make determinations in procurement protests, and initiate action against solicitations and awards that violate federal procurement policy. The unlawful actions[38] that Congress focused on were plainly addressed in the Competition In Contracting Act and other procurement statutes. It does not appear that Congress contemplated that deviations from AR 215–4 during the course of an Army NAF procurement be included within the meaning of "unlawful actions." Rather, it is more logical to infer that the intent of Congress was that alleged violations of AR 215–4 be handled by the Army because Army NAFI's and their operations are the sole responsibility of the Army.[39]

This is further supported by the fact that the Comptroller General did not receive exclusive authority to decide all bid protests. There was no intent, for example, that the Comptroller General decide matters dealing with the Small Business Administration's responsibilities to issue Certificates of Competency to small businesses.[40] There appears to be no intent to permit a disappointed bidder or offeror on an Army NAF procurement to file a protest with the Comptroller General. The term "procurement statute or regulation" does not necessarily include AR 215–4.

The best interests of the Army mandate opposition to Comptroller General protest jurisdiction over NAF procurements. The language of Competition In Contracting Act provisions and its legislative history reflect Congressional intent that the Comptroller General's protest jurisdiction is strictly limited, and does not extend to Army NAF procurements. The Army should accordingly adopt a new NAF protest policy mandating an exclusive agency procedure to resolve all protests involving Army NAF procurements.

GSBCA Bid Protest Authority

When an APF contracting officer conducts an acquisition for an Army NAFI, the new NAF protest policy permits protests (involving ADP solicitations) to the GSBCA. The Competition In Contracting Act gave the GSBCA[41] bid protest jurisdiction over all federal agency automatic data processing (ADP) acquisitions conducted under the Brooks Act.[42] This was to be a three year trial period, but after only two years, the Paperwork Reduction and Reauthorization Act made the test program permanent. The Paperwork Reduction and Reauthorization Act[43] also expanded the definition of ADP and granted the GSBCA authority to determine its own jurisdiction. Does GSBCA protest authority extend to Army NAF ADP procurements?

An interested party may protest to the GSBCA[44] an ADP acquisition that is subject to the strict acquisition requirements of the Brooks Act and the Federal Information Resources Management Regulation (FIRMR).[45] The General Services Administration (GSA) has not yet determined, however, whether DOD NAFI ADP procurements are subject to these requirements. Moreover, the GSBCA has not required DOD NAFI's that are procuring ADP to do so

---

[32] Army Federal Acquisition Reg. Supp. 1.9003, Acquisitions Using Nonappropriated Funds, authorizes APF contracting officers to provide acquisition support to Army NAFI's.

[33] AR 215–4, para. 3–11.

[34] Leg. Hist, *supra* note 31.

[35] *Id.*

[36] 31 U.S.C.A. § 3702 (West Supp. 1988).

[37] Leg. Hist., *supra* note 31, at 697.

[38] *Id.* at 2123.

[39] In this regard, Army NAFI's are created under authority granted the Secretary of the Army. *See* 10 U.S.C.A. § 3013 (West Supp. 1988).

[40] Leg. Hist., *supra* note 31; Competition In Contracting Act, *supra* note 17.

[41] 31 U.S.C.A. § 3552 (West. Supp. 1988).

[42] 40 U.S.C.A. § 759(f)(1) (West Supp. 1988) [hereinafter Brooks Act].

[43] Pub. L. No. 99–500, 100 Stat. 1783–342 (1986); Pub. L. No. 99–591, Title VIII, § 821–825, 100 Stat. 3341–342 (1986) (codified at 40 U.S.C.A. § 759(h) (West Supp. 1988)).

[44] Brooks Act, *supra* note 42.

[45] 41 C.F.R. ch. 201 (1987) [hereinafter FIRMR]. The General Services Administration regulation which controls the management and acquisition of information resources by most federal agencies.

under Section 111 of the Federal Property and Administrative Services Act,[46] and therefore confer bid protest jurisdiction on the GSBCA.[47]

The Department of Defense has not stated that Army NAFI's must comply with the acquisition requirements in the Brooks Act and the FIRMR when acquiring ADP.[48] The FAR states that those ADP acquisition protests not subject to the Brooks Act and the FIRMR "may not be heard by the GSBCA, but may be heard by the agency, the courts, or the GAO.[49]

Although the GSBCA has not yet decided whether DOD NAF procurements are subject to its bid protest jurisdiction, and the GSBCA's jurisdictional authority appears to extend to at least *some* ADP acquisitions,[50] the GSBCA jurisdictional authority should not extend to DOD NAF ADP acquisitions. DOD NAF's are not federal agencies that must conduct ADP acquisitions under the provisions of the Brooks Act. They are not, therefore, in the same category as the acquisitions for the Office of the Comptroller of the Currency that were the basis for the decision in *Rocky Mountain Trading Co.*[51] The Army policy adopted in AR 215–4 that consents to GSBCA jurisdiction over some NAF procurement protests is premature. NAF ADP procurement protests should be resolved through an exclusive agency protest procedure. The proponent of AR 215–4 agrees with this conclusion.[52]

A forthcoming change to AR 215–4 will establish a new policy for handling Army NAF ADP protests.[53] The change will specify that NAF ADP acquisitions will be accomplished only by NAF contracting officers using NAF procurement procedures. The Army policy adopted in AR 215–4 that consents to GSBCA jurisdiction over NAF ADP procurement protests will be deleted. The new protest policy will prescribe an exclusive agency procedure for processing NAF ADP protests.

Conclusion

The Army policy decision on NAF acquisition protests has the potential to increase litigation for the Army. The number of NAF acquisitions, to include combined NAF and APF acquisitions, is uncounted but significant. Given limited personnel and fiscal resources, it does not make sense to increase that workload *unless we have to.* An agency procedure where installation contracting officers and installation commanders finally resolve such protests is therefore desirable, and clearly more economical.

Based on the above analysis of the issues, Army NAFI's should not be held to the strict bid protest procedures set forth in FAR Subpart 33.1 and its supplements. There is precedent from the GAO that DOD NAFI's are not federal agencies and thus not required to follow the bid protest procedures set forth in the FAR. There is a strong indication that the GSBCA will make the same determination. The Army should, therefore, develop and use an exclusive agency procedure for finally resolving *all* NAF procurement protests.

[46] Brooks Act, *supra* note 42.

[47] *Id.*

[48] *See generally* AR 215–4, *supra* note 1.

[49] FAR 33.105(a)(1); *see* Brooks Act, *supra* note 42.

[50] *See Rocky Mountain Trading Co.*, GSBCA No. 8958–P, 87–2 BCA ¶ 19,840 [hereinafter *Rocky Mountain Trading Company*]; *See also* Munns, *Acquisition of ADPE by DOD Nonappropriated Fund Instrumentalities*, The Army Lawyer, Jan. 1988, at 31.

[51] GSBCA No. 8958–P, 87–2 BCA ¶ 19,840.

[52] Telephone conversation with Ms. Patterson, Attorney-Advisor, Contract Law Division, OTJAG (20 July 1988).

[53] *Id.*

In Defense of Army NAF Bid Protest Procedures

Margaret K. Patterson
Attorney-Advisor, Contract Law Division, Office of The Judge Advocate General

Purpose Behind the Regulation

The guidance set forth in Army Regulation 215–4, *Nonappropriated Fund Contracting*,[1] concerning bid protest procedures was, and is, intended to be just that: guidance for the field on how to process bid protests.[2] By distinguishing between procurements accomplished by nonappropriated fund (NAF) contracting officers and those accomplished by appropriated fund (APF) contracting officers, the regulation reflects the current law set out in Comptroller General decisions.[3] For our purposes, it is irrelevant whether the Comptroller General correctly assessed the scope of his jurisdiction under the Competition

[1] Army Reg. 215–4, Morale, Welfare, and Recreation—Nonappropriated Fund Contracting (9 Dec. 1987) [hereinafter AR 215–4]. This was originally issued as a separate publication, but is now contained in the MWR UPDATE.

[2] In reality, although no figures are routinely collected, bid protests are not very prevalent in NAF procurements. This may be because, by and large, the average dollar value of a NAF purchase tends to be low (typically less than $25,000).

[3] *See* Patterson, *The New NAF Contracting Regulation*, The Army Lawyer, Mar. 1988 at 12, where the purpose behind the new NAF Contracting Regulation has been explained.

in Contracting Act,[4] or whether some arguments might be made in an appropriate GAO protest. The proponents of AR 215–4[5] recognized that the *Artisan Builders*[6] decision in 1986 changed the way the GAO was looking at its jurisdiction over NAF procurements, and felt that contracting officers who were accomplishing NAF procurements needed definitive guidance on what to do if a bid protest was received. The proponents did not feel the contracting officers would be well served by merely presenting them with a position to argue before the GAO in an attempt to convince it that its interpretation of CICA was wrong.[7] If the bid protest procedures of AR 215–4 have created any additional burden for the Army, at least no significant ill effects have been felt at the Bid Protest Branch of the Office of The Judge Advocate General, where bid protests before the GAO involving nonappropriated funds have come to the grand total of four since the inception of CICA bid protest procedures on 15 January 1985. (During this same time period, overall bid protest volume averaged about 250 per year.)

Exclusive Agency Procedure

The notion that the Community & Family Support Center should have prescribed an exclusive agency procedure in AR 215–4 to resolve all protests involving Army NAF procedures (those issued by both NAF and APF contracting officers), and thereby could have managed to avoid the Comptroller General's jurisdictional grasp, may be appealing,[8] but is erroneous. Agency regulations do not supersede or control the scope of the Comptroller General's jurisdiction. Major Munns argues that the provisions of AR 215–4, in and of themselves, grant the GAO bid protest jurisdiction. This argument is mistakenly based on the new Comptroller General rule,[9] which provides that the GAO may consider protests by agencies of the government other than federal agencies, if that agency has agreed in writing to have its protests so decided. Obviously, the unilateral provision in AR 215–4, which does nothing more than reflect what the GAO has already told us, certainly does not rise to the level of an "agreement in writing"; for one thing, there is no meeting of the minds such as is necessary for an "agreement."[10]

APF Contracting Officer as Agent of NAFI

While I agree that NAFI's themselves are not federal agencies for the purpose of the Comptroller General's statutory bid protest jurisdiction, this does not diminish the Comptroller General's holding in *Artisan. Artisan* says it is a procurement by a federal agency if it is accomplished by an appropriated fund contracting officer. Whether the procurement is being accomplished for the benefit of a NAFI, and whether the NAFI itself is a federal agency, are irrelevant to the jurisdictional issue as far as the Comptroller General is concerned.

Although I also agree that procurements for a NAFI *should* be outside the scope of the Comptroller General's protest jurisdiction if they are accomplished by the APF contracting officer as agent for the NAFI, and only nonappropriated funds are used, the *Ace Amusements, Inc.* decision[11] makes it clear that the Comptroller General does not see it that way. That decision involved an RFP issued by the Ft. Hood Contracting Division, Directorate of Contracting Activities. The GAO said, citing *Artisan,* "We have jurisdiction over this protest, even though the procurement is for a NAF activity, because the procurement is conducted by the Department of the Army, a federal agency."

In addition, the Comptroller General's recent affirmation[12] that procurements by nonappropriated fund activities are beyond his bid protest jurisdiction is perfectly consistent with the holding in *Artisan* that a procurement by an appropriated fund contracting officer, for or on behalf of a NAFI, is not a procurement by a DOD NAFI, but rather a procurement by a federal agency.

Use of FAR Procedures

In deciding the jurisdictional issue, the Comptroller General considered it irrelevant whether the APF contracting officer used Federal Acquisition Regulation (FAR)[13] procedures and clauses.

In *Artisan,* the contracting officer may have used FAR procedures and clauses, although the published decision does not indicate whether that was the case.[14] If the Comptroller General was applying a "two-pronged" test, he did not emphasize this in his decision, to say the least. The only possible basis for the two-pronged interpretation of *Artisan* might be the portion of the decision stating that "since this procurement was conducted by the base contracting officer

---

[4] 31 U.S.C.A. §§ 3551–3556 (West Supp. 1988) [hereinafter CICA].

[5] Deputy Chief of Staff for Personnel (DCSPER), acting through a field operating agency, the US Army Community & Family Support Center (CFSC).

[6] Comp. Gen. Dec. B–220804 (24 Jan. 1986), 86–1 CPD ¶ 85. Referred to hereinafter as *Artisan.*

[7] At least one other service appears to agree with the Army's approach. The Air Force is in the process of revising its NAF contracting regulation, AF 176–9, to reflect the GAO's assumption of bid protest jurisdiction over NAF purchases made by a federal agency.

[8] Then again, it may not. There are those in the Army who are of the opinion that the GAO is not necessarily an undesirable forum for resolution of protests. Of 702 protests filed against Army procurements in FY 87, only 29 were sustained by GAO.

[9] Code of Federal Regulations, Part 21, Title 4 (15 Jan. 1988) at section 21.11.

[10] *See* Black's Law Dictionary definition of "agreement." *See also* Leonard v. Marshall, 82 F. 396, 399.

[11] Comp. Gen. Dec. B–222479 (14 July 1986), 86–2 CPD ¶ 65.

[12] Comp. Gen. Dec. B–225959 (6 Feb. 1987).

[13] Federal Acquisition Regulation (1 Apr. 1984) [hereinafter FAR].

[14] *Artisan* cites T.V. Travel, Inc., et al.,—Request for Reconsideration, Comp. Gen. B–218198.6 *et al.* (10 Dec. 1985), 85–2 CPD ¶ 640 as precedent. The issue in *T.V. Travel* (which involved no expenditure of appropriated funds) was whether the complaint concerned a procurement contract for property or services. While the GAO did discuss the FAR and FPASA's applicability to this procurement, it appeared to be for the purpose of determining if, in fact, this was a procurement subject to applicable procurement laws. There is nothing in the decision to indicate that use of nonappropriated fund contracting procedures would have made any difference.

at Williams Air Force Base, and since Artisan alleges that the Air Force, a federal agency, violated the federal procurement statutes and regulations, we have jurisdiction."

Even if the above statement established a two-pronged test, it is still quite a leap to treat the term "federal procurement statutes and regulations" as coterminous with FAR. It would be difficult to argue that the Nonappropriated Fund Contracting regulation is not also a federal procurement regulation, as it is published by the authority of the Secretary of the Army, and is expressly authorized by the Army FAR Supplement (AFARS).[15] Furthermore, AR 215–4 incorporates various FAR provisions by reference and virtually mimics others.[16] Because of this, it is also not a fair statement that the contracting officer is not permitted to use FAR procedures and clauses when accomplishing a NAF procurement. The other reason is that paragraph 3–11 of AR 215–4 actually does not prohibit using FAR clauses. It is written more in terms of an invocation to use NAF procedures and clauses. There are still gaps in NAF guidance where the contracting officer has no alternative but to turn to the FAR for guidance, when this would not violate AR 215–4.

Perhaps *Artisan* does not clarify what was included within the scope of a violation of "procurement statutes and regulations" because the Comptroller General was not establishing this as one of the prongs of the so-called "two-pronged" requirement. Later decisions bear this out, in that they do not follow the "violation of federal procurement statute or regulation" language. Rather, they speak in terms of taking jurisdiction solely because the procurement was conducted by a federal agency. In fact, later decisions compel the conclusion that there is no situation involving a procurement accomplished by an appropriated fund contracting officer where GAO will not take jurisdiction.

In *Flexsteel Industries, Inc.; Lea Industries, Inc.*,[17] which involved a Department of State procurement, the Department of State contended that the GAO had no jurisdiction because the Department was exempt from the Federal Property and Administrative Services Act (FPASA)[18] and FAR. The Comptroller General held that his bid protest jurisdiction was not affected by the extent to which an agency may be covered by FPASA and FAR. The Department of State did not dispute that it was a federal agency.

In *Gino Moreno Enterprises*,[19] the Air Force argued that GAO had no jurisdiction to decide the protest because the concession agreement in issue was not a procurement contract. The Comptroller General responded by asserting its jurisdiction under CICA, basing the decision on the fact that the concession agreement was awarded by the Base Military Training School at Lackland Air Force Base, undisputedly a federal agency. The GAO also pointed out that the concession agreement is a contract for services under which the agency would satisfy its needs, and therefore is a procurement contract. Because appropriated funds were not involved, and the GAO recognized that "basic procurement statutes are not applicable," it held that in such a situation, it would review the actions taken by the agency to determine whether "they are reasonable." Thus, the FAR need not apply in order for GAO to have jurisdiction.

The above proposition was reaffirmed in *TLM Marine, Inc.*,[20] a protest against a solicitation issued by the Maritime Administration (Marad) for custodial services for offshore drilling units. TLM complained that the solicitation did not comply with FAR. Marad questioned GAO's jurisdiction, asserting that it was not bound by FPASA and its implementing regulations, and no appropriated funds were involved. GAO concluded it had jurisdiction, saying:

> The authority of this office to decide protests is based on 31 USC sec 3551 et seq. (Supp. III 1985) under which we are to decide protests filed by interested parties challenging solicitations issued by federal agencies for proposed contracts for property or services or the awards or proposed awards of such contracts [citing *Artisan*]. The solicitation in this case was issued by Marad, which no one contends is not a federal agency. . . . Further, for purposes of our protest jurisdiction, it does not matter the extent to which the procurement statutes and regulations may apply [citing *Geno Moreno*]. . . .

In fact, in the above case, GAO agreed with Marad that they were exempt from strict compliance with FPASA, CICA, and FAR because of their broadly worded statutory authority to conduct procurements.

There are numerous other decisions that serve to further diminish the validity of the so-called "two-pronged" jurisdictional interpretation of the *Artisan* decision. In *CPT Text-Computer GmbH*,[21] the Comptroller General held that he had jurisdiction under CICA over a bid protest concerning a procurement of ADP where the solicitation was issued by the US Army Contracting Agency, Europe, even though the end user was a NAF activity and no APF was involved. Citing *Artisan* as a precedent, GAO said: "As we explained in that decision, our jurisdiction under CICA extends to bid protests challenging procurements conducted by any federal agency . . . ."[22]

The Comptroller General's jurisdiction over NAF procurements conducted by a federal agency, after *Artisan*,

---

[15] AFARS 1.9003.

[16] *See, e.g.*, paras 4–2 and 4–42, AR 215–4.

[17] Comp. Gen. Dec. B–221192, B–221192.2 (7 Apr. 1986), 86–1 CPD ¶ 337. This was a combined protest submitted through a manufacturer's representative.

[18] 40 U.S.C.A. § 471 *et. seq.* (West Supp. 1988).

[19] Comp. Gen. Dec. B–224235 (5 Feb. 1987), 87–1 CPD ¶ 121.

[20] Comp. Gen. Dec. B–226968 (29 July 1987), 87–2 CPD ¶ 111.

[21] Comp. Gen. Dec. B–222037.2 (3 July 1986), 86–2 CPD ¶ 29.

[22] *See* Brunswick Bowling & Billiards Corp., Comp. Gen. Dec. B–224280 (12 Sept. 1986), 86–2 CPD ¶ 295; Barbarossa Reiseservice GmbH, Comp. Gen. Dec. B–225641 (20 May 1987), 87–1 CPD ¶ 529; International Line Builders—Reconsideration, B–227811.2 (10 Nov. 87), 87–2 CPD ¶ 472.

became so well-established that later decisions contained only footnote discussions of jurisdiction.[23]

ADP Procurements

It is true that AR 215–4 will, in the next MWR, UPDATE contain a provision that ADP procurements are to be accomplished only by NAF contracting officers, using NAF procedures. That guidance, however, did not result from criticism against the bid protest procedures of AR 215–4. Rather it responded to the long-recognized premise that particular guidance was needed in the area of ADP procurement and, to the extent that accomplishment of ADP procurements only by NAF contracting officers could avoid GSBCA bid protest jurisdiction, it was prudent to do so. It is important to remember that the GSBCA (unlike the GAO) has not yet had to decide whether it has jurisdiction over a nonappropriated funded procurement of ADP accomplished for a DOD NAFI by either an APF or NAF contracting officer. Admittedly, AR 215–4 could have required *all* nonappropriated funded procurements to be accomplished by a NAF contracting officer and thereby avoided the bid protest jurisdiction of the GAO. To require this for all NAF procurements, however, would have been impractical and would have created an immense burden (in terms of personnel, resources, training and Headquarters expenses) on the NAF contracting officers at the CFSC Contracting Division to accomplish procurements above the warrant level of the local NAF contracting officer.[24]

Conclusion

One should not conclude that the bid protest procedures contained in AR 215–4 "do not serve the best interests of the Army" simply because one does not like, or agree with, the Comptroller General's decisions. It surely would not serve anyone's best interests to ignore or misinterpret the current opinions concerning jurisdiction over NAF bid protests.

[23] Micronesia Media Distributors, Inc., Comp. Gen. Dec. B-222443 (16 July 1986), 86-2 CPD ¶ 72; Martin Advertising Agency, Inc., Comp. Gen. Dec. B-225347 (13 Mar. 1987), 87-1 CPD ¶ 285.

[24] *See* para 3-12, AR 215-4, which provides CFSC Contracting Officers (who hold higher dollar NAF warrants) may be requested to assist in NAF procurements over the dollar warrant level of the local NAF contracting officer.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Captain Ralph L. Gonzalez
Defense Appellate Division

A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense?

Introduction

"The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed."[1] These words are particularly appropriate in court-martial practice where sentencing procedures are firmly rooted in the adversarial tradition. Recently, there has been a significant trend toward adoption of a more open forum for sentencing,[2] exemplified by the federal presentencing report. The arguably neutral objective[3] promulgated by the Army Court of Military Review in favor of allowing the sentencing authority to consider all the facts necessary to fashion an individualized sentence

[1] 18 American Bar Association Standards for Criminal Justice § 6.3(e) (2d ed. 1986 supp.).

[2] Some examples of government overreaching are demonstrated as follows. Government trial counsel often argue that the rules of evidence are relaxed despite the presence of Rule for Courts-Martial [hereinafter R.C.M.] 1001(c)(3), Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984 or Manual]. Similarly, when the rules of evidence seem to preclude the admission of certain evidence, the government has been given the option to seek admissibility not only through a pertinent military rule of evidence, but also "under a less stringent sentencing rule." United States v. Anderson, 25 M.J. 779, 780 (A.C.M.R. 1988). In effect, R.C.M. provisions are made to become rules of evidence. The above decision reflects a judicial attempt to reformulate the Manual provisions into a more flexible process. Unfortunately, attempts to fully embrace the federal sentencing practice into the administration of military justice are not logically coherent. Aside from the philosophical orientation of each respective system, there are serious structural differences in both the constitutional and statutory developments of each system of jurisprudence. Finally, assimilating the presentence report seems to be counterproductive as the Federal government is currently attempting to modify the discretionary powers of the Federal judiciary by adopting sentencing guidelines in an effort to insure that individuals are uniformly punished for their crimes.

[3] United States v. Wright, 20 M.J. 518, 520 (A.C.M.R. 1985) (It is necessary to know "the offender as a whole person" in order to obtain an individualized sentence.).

radically challenges the adversarial nature of our sentencing proceedings. What is often not stated, but is well understood in the rhetoric of individualized sentences, is that the vast majority of individuals who have committed chargeable offenses lack the sterling character necessary to benefit from this new doctrine of openness. The defense response must invariably be that the rules of procedure and evidence should seek to fashion an individualized sentence for the crime committed, not necessarily for the individual who happens to have committed the crime.[4]

In preserving the adversarial sentencing practice envisioned by the drafters of the *Manual* from judicial attempts to emulate a federal presentence report, Rule for Courts-Martial [hereinafter R.C.M.] 1001(b)(4) represents the major battleground. It provides in pertinent part: "Trial counsel may present evidence as to any aggravating circumstances *directly relating to* or resulting from *the offenses* of which the accused has been found guilty."[5] This article focuses upon aggravation evidence that may be submitted by way of matters "directly relating to" an offense of which an accused has been found guilty.[6]

First Line of Defense—Specificity

The rules of evidence applicable in courts-martial for the government are not relaxed during sentencing.[7] In other words, the *Manual* provisions contained in R.C.M. 1001(b) are neither rules of evidence nor their substitutes.[8] R.C.M. 1001(b) and (f) merely define potentially relevant items to which the rules of evidence must be applied to determine their ultimate admissibility.[9]

To effectively limit the impermissible use of R.C.M. 1001(b), defense counsel must require trial counsel to define the theory of admissibility. Defense counsel are constantly required to challenge aggravation evidence through timely and specific objections.[10] Similarly, trial counsel should be required to state with specificity under which rule of procedure the evidence is offered (R.C.M. 1001(b)(1)–(5)). For example, under R.C.M. 1001(b)(4), trial counsel must state, and the military judge should rule, whether the aggravation evidence relates directly to the offense or results from the offense.[11] Defense counsel must also require trial counsel to explain how the aggravation evidence is relevant to specific sentencing objectives.[12]

In order to accomplish the above prescriptions, counsel should rely on the *Manual* provisions that seek to clarify the adversarial process. In attempting to force the government's theory of admissibility during trial, counsel should rely upon R.C.M. 906(b)(6) and request a bill of particulars. Such a request would allow the court to narrow the scope of inquiry between matters "related to" and "resulting from."[13] Motions to suppress evidence under R.C.M. 905(b)(3)[14] or to request preliminary rulings on the admissibility of evidence under R.C.M. 906(b)(13)[15] should also be considered as convenient methods of resolving evidentiary questions prior to trial. Military Rule of Evidence [hereinafter M.R.E.] 103[16] should be used as a guide in formulating defense objections and motions.

Counsel should also be wary of the negligent or intentional introduction of evidence during findings that will impact upon a determination of the appropriate punishment during presentencing. R.C.M. 1001(f)(2)[17] allows the consideration during sentencing of any evidence admitted on findings.[18] There is no provision in the *Manual*, however, for the waiver of the rules of evidence for the presentation of direct evidence or the consideration of evidence already

---

[4] The current position of the Army Court of Military Review is "that the punishment should fit the offender and not merely the crime." *Wright*, at 519 (A.C.M.R. 1985). These differing philosophical orientations are more than mere semantics. The conventional view attempts to differentiate between individuals and assess an appropriate sentence. The position taken by this author is that sentencing authorities should attempt to differentiate between the manner in which crimes were committed. Such an analysis does contemplate the relative goodness and badness of certain acts; however, it ignores the relative goodness and badness of the individual. *See* United States v. Kinman, 25 M.J. 99, 100 (C.M.A. 1987); *see also infra* note 32.

[5] MCM, 1984 (emphasis added).

[6] This article does not address those matters that the government may seek to introduce as circumstances that are "resulting from the offense" to which the accused has been convicted. Those matters are more appropriately referred to as repercussion evidence or victim impact. *See* United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982); R.C.M. 1001(b)(4) discussion.

[7] Gaydos, A Prosecutorial Guide to Court-Martial Sentencing 114 Mil. L. Rev. 1, 20 (1986); R.C.M. 1001(c)(3); *see* United States v. Tipton, 23 M.J. 338, 344 (C.M.A. 1987) (In *Tipton*, the court rejected the government's argument that relaxed rules of evidence on sentencing should abate spousal privilege.)

[8] Gaydos, *supra* note 5, at 20–21; United States v. May, 18 M.J. 839, 842 (N.M.C.M.R. 1984).

[9] R.C.M. 1001(c)(3) specifically provides that the rules of evidence on extenuation and mitigation are relaxed. R.C.M. 1001(d) provides that the rules of evidence are relaxed on rebuttal for the prosecution to the extent that the defense relied upon matters under (c)(3). In order to avoid any loosening of the rules under (d), defense counsel need merely authenticate their documents with attesting certificates and follow other evidentiary requirements in order to completely close the door to any government aggravation evidence that does not meet full evidentiary standards.

[10] United States v. Glazier, 24 M.J. 550, 553 (A.C.M.R. 1987).

[11] All too often judicial trial rulings will state that aggravation evidence is admitted because it "directly relates to or results from" the charged offense. Although such a ruling is convenient, the lack of specificity will create an appellate nightmare as the government is free to argue and the court is often willing to accept any theory of admissibility on appeal. Therefore, defense counsel should specifically request that the military judge find that one or the other is not the basis for admission.

[12] *See* R.C.M. 1001(g). *See also infra* note 31 and accompanying text.

[13] MCM, 1984. Although a bill of particulars is used primarily to inform the accused of the exact nature of the charge, there is precedent for using such a device beyond the specificity of the language of the pleadings. In United States v. Alef, 3 M.J. 414, 419 n.18 (C.M.A. 1977), the Court suggested that defense counsel use a bill of particulars in order to isolate the factors relevant to jurisdication under Relford v. Commandant, 401 U.S. 355 (1971).

[14] MCM, 1984.

[15] MCM, 1984. Preliminary rulings have also been characterized as motions *in limine*. *See* R.C.M. 905(b)(3) discussion.

[16] MCM, 1984.

[17] "In addition to matters introduced under this rule, the court-martial may consider—(2) Any evidence properly introduced on the merits before findings, including (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and (B) Evidence relating to mental impairment or deficiency of the accused."

[18] *See* United States v. Neil, 25 M.J. 798, 800 (A.C.M.R. 1988).

admitted by the prosecution under any provision of R.C.M. 1001. As such, any evidence admitted on findings should be retroactively measured, on defense motion, by the admissibility standards provided below. Therefore, defense counsel may find it necessary to seek a limiting instruction for evidence previously admitted on findings, in order to narrow the evidentiary focus for the purposes of sentencing. M.R.E. 105 should be used in an effort to limit consideration of any evidence for a specific government purpose.

What Does "Related" Mean

In an attempt to define what is "directly related to an offense," the Army Court of Military Review has opined that it will "liberally construe" R.C.M. 1001(b)(4) in order to effect the intent of the presentencing rules.[19] Even though this language seems to permit the almost unlimited flow of adverse information about the accused, defense counsel has considerable authority for a more restricted interpretation within the plain meaning of the term "directly related."

The rules of procedure were recently designed to expand the consideration of aggravation evidence. The consideration of this evidence, however, must be within the protections of an adversarial setting and the rules of evidence.[20] Any movement towards the introduction of aggravation evidence constitutes a liberalization of procedure, because prior military practice did not allow for the introduction of aggravation evidence in contested cases.[21] Defense counsel should therefore harken back to the plain meaning of the words "directly related" and ignore the government's rhetoric in favor of the substantive analysis provided below.

The words "directly related" seem patently clear. However, a formula for analysis is needed to refute the government's generalizations. Webster's New World Dictionary (College Edition) provides a useful point of departure in that it defines "related" as "close connection through common origin, interdependence."[22] This same interdependence is used in *United States v. Silva*,[23] wherein the Court of Military Appeals found that contemporaneous statements of uncharged misconduct made by the accused "directly related to the offense" because these statements were necessary "so that the circumstances surrounding that offense . . . [might] be understood by the sentencing authority."[24] Herein lies the answer; uncharged similar acts[25] should only be admissible when those same acts help to explain the circumstances of the offense for which appellant is about to be punished.[26]

If the government proffer of evidence fails to explain a particular circumstance of the actual charged offense (i.e., no interdependence), the evidence should not be considered as being related directly to the offense for the purposes of R.C.M. 1001(b)(4). Government evidence that does not explain a circumstance of the charged offense, and is therefore unrelated, poses the very significant danger that a defendant will be punished generally and not for the crime committed.

Obviously, the *res gestae* of the charged offense will explain how the event occurred and will *normally* be considered directly related.[27] Prior acts of misconduct or events that are beyond *res gestae*, however, must have some interdependence with the offense and therefore assist in explaining the circumstances of the charged offense. For example, in *United States v. Manley*,[28] the Court of Military Appeals noted that the presence of a burned marijuana cigarette in the defendant's car was unrelated to a conviction for the possession of drugs two months earlier.[29] Obviously, this later possession could demonstrate that the accused had not mended his ways; however, the subsequent possession does not explain any circumstance surrounding the initial possession for which the accused stands convicted.[30]

In offering further argument against an expanded interpretation of R.C.M. 1001(b)(4), counsel should assert that the practical effect of a liberal interpretation of the rule would render the other provisions of R.C.M. 1001(b) meaningless. Accordingly, the expressed limits of R.C.M. 1001(b)(2), (b)(3) and (b)(5) would be emasculated if aggravation evidence were admitted on the basis of R.C.M. 1001(b)(4) alone. As has been previously noted, "[t]he drafters would have served no purpose in specifying . . .

---

[19] United States v. Witt, 21 M.J. 637, 640 (A.C.M.R. 1985).

[20] R.C.M. 1001 analysis at A21–63.

[21] United States v. Allen, 21 C.M.R. 609, 612 (C.G.B.R. 1956); United States v. Gewin, 14 U.S.C.M.A. 224, 34 C.M.R. 4, 5 (1963) (In some circumstances, evidence that had been adduced at findings concerning other acts of misconduct could not be considered during sentencing and it was error not to provide a limiting instruction.)

[22] Webster's New World Dictionary, College Edition, 1986.

[23] 21 M.J. 336 (C.M.A. 1986).

[24] 21 M.J. at 337 (C.M.A. 1986) (quoting United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982).

[25] The analysis above and below is not limited to similar act evidence. The conceptual framework relates to any aggravation evidence. For the purposes of discussion, however, similar acts evidence is the most illustrative.

[26] Unspecified instances of misconduct were not shown to "concern the circumstances surrounding the commission of the offense;" therefore, these statements were not proper matters in aggravation. United States v. Billingsley, 20 C.M.R. 917, 919 (A.B.R. 1955).

[27] Equivocating words are purposefully used because *res gestae* belies definition. In this context, *res gestae* should be understood to mean an explanation of how the *charged* offense itself occurred. In other words, when the offense legally began and when it was legally complete should be the nominal zone of consideration.

[28] 25 M.J. 346 (C.M.A. 1987).

[29] 25 M.J. at 351. *Compare* United States v. Martin, 20 M.J. 227, 232 (C.M.A. 1985) (Chief Judge Everett notes that prior acts of distribution would assist the sentencing authority in determining whether an individual was making a casual distribution or engaging in a drug enterprise.) The uncharged misconduct in the above hypothetical does explain a circumstance of the offense. In another example, the court seems to question the nexus between prior similar acts of misconduct and the charged offense by suggesting that the uncharged sexual assaults perpetrated against the same victim may not have been admissible pursuant to R.C.M. 1001(b)(4). *Kinman*, 25 M.J. at 100 n.1.

[30] Realistically, the evidence of this other possession evinces a poor rehabilitative potential. Under the rules, however, consideration of the evidence does not reach that far as the matter is unrelated and poses the very real risk that the defendant will be punished for the other offense.

modes of presenting evidence, with all the safeguards attached, if the government could present a general denigration in any event."[31]

Relevance Under M.R.E. 401

Once is has been determined that a matter is directly related to an offense, the military rules of evidence must also *specifically* provide for the admission of such information. In determining admissibility, the defense counsel must stress the rules of evidence that seek to prohibit or limit particular types of evidence.

As Chief Judge Everett has previously indicated, the evidence should be considered for its relevance to an appropriate sentence in light of the general sentencing philosophies.[32] To establish relevance, trial counsel must: "(1) describe the evidence; (2) explain its nexus to the consequential issue at bar; and (3) indicate how the offered evidence will establish the fact in question."[33] Therefore, trial counsel should be challenged to prove how a particular piece of evidence will apply to a specific sentencing goal and how that evidence will prove the asserted matter.

Defense counsel must attempt to rebut any asserted nexus between the aggravating evidence and the applicable sentencing philosphy. R.C.M. 1001(g) delineates the generally accepted sentencing philosophies to include: "rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused and social retribution."[34] Aggravation evidence must be relevant to one of these policies. In juxtaposition with the above analysis, R.C.M. 1001(b)(4) admonishes the acceptance of evidence beyond the parameters stated in the rule by indicating that the rule "does not authorized introduction in general of evidence of bad character or uncharged misconduct."[35] The goal is not to establish an individualized sentence for the accused, but rather, to furnish an individualized sentence for the crime the accused committed.[36]

In evaluating evidence on aggravation, trial counsel may suggest that the evidence is indicative of the accused's criminal "state of mind." Criminal "state of mind" or the level of culpability for the charged offense is obviously relevant to the sentencing authority in fashioning punishments for both general and specific deterrence and social retribution. The real question is what evidence actually proves this "state of mind." The mere occurrence of an uncharged criminal act (i.e., a drug distribution) does not connote a relevant state of mind.[37] Proof of the "state of mind" is found not in the act itself, but in the facts surrounding those prior acts.[38]

For example, in *United States v. Pooler,*[39] the accused's expressed willingness to engage in future criminal distributions proved an ongoing criminal enterprise "state of mind."[40] In *United States v. Wright,*[41] the accused's statement of remorse in the record of a previous trial was utilized to demonstrate that the accused was lacking credibility by now favorably urging his own rehabilitative potential.[42] The surrounding circumstances proved more about the accused's state of mind in each of these cases than what could be reasonably inferred from the specific acts involved therein.

Therefore, a guideline could be formulated as follows: the mere act of a prior distribution (or even a series of distributions) may fail to qualify as relevant aggravation evidence. On the other hand, as in *Pooler,* if trial counsel can successfully argue that the circumstances of those distributions prove something other than a willingness to distribute, the required relevancy may exist.[43]

In evaluating whether the particular circumstances of a prior act are relevant, defense counsel should oppose admission where the lack of foundation or the remoteness of the event is questionable.[44] As was demonstrated in *United States v. Boulton,*[45] the mere possession of a sexually-explicit magazine was irrelevant to a conviction for indecent

---

[31] United States v. Peace, 49 C.M.R. 172, 173 (A.C.M.R. 1974); *see also* United States v. Berger, 23 M.J. 612, 615 (A.F.C.M.R. 1986) ("Not everything is admissible in presentencing proceedings, to the contrary, prescribed rules must be observed.")

[32] *Martin,* 20 M.J. at 227.

[33] Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual 334 (2d ed. 1986) [hereinafter Saltzburg].

[34] MCM, 1984. It should be remembered that R.C.M. 1001(b)(5), MCM, 1984 precludes the admission of specific instances of misconduct to prove rehabilitative potential.

[35] R.C.M. 1001(b)(4) analysis at A21–63; *Peace,* 49 C.M.R. at 173 (If the government wishes to portray an accused as a bad individual then "[u]nrelated anti-social acts may be shown through prior convictions or personnel records entries" and not through R.C.M. 1001(b)(4), MCM, 1984.); *see also* United States v. Taliferro, 2 M.J. 397, 398 (A.C.M.R. 1975).

[36] Kinman, 25 M.J. at 100 ("[A] judge may only impose a sentence based on the crimes of which the accused stands convicted.")

[37] United States v. Gambini, 13 M.J. 423, 429 (C.M.A. 1982) ("Evidence of uncharged misconduct to be admissible at court-martial must have a *substantial value* as tending to prove something other than a fact to be inferred from a disposition of the accused.")

[38] *See Martin,* 20 M.J. at 232 ("To illustrate, in a drug distribution case, it will help the sentencing authority to learn whether the accused distributed the drug to a friend as a favor or whether he did so as part of a large business that he operated.") (Everett, C.J. concurring).

[39] 18 M.J. 832 (A.C.M.R. 1984).

[40] 18 M.J. at 833. The application of this evidence is similar to the hypothetical proposed by Chief Judge Everett in *Martin,* 20 M.J. at 232.

[41] 20 M.J. 518 (A.C.M.R. 1985).

[42] 20 M.J. at 520 (Specific statements of the accused and the military judge's admonitions from the accused's prior trial were proper circumstantial evidence of his attitudes towards his most recent crimes.) Although these latter statements were not contemporaneous with the subject matter of the prior convictions, the statements were valuable proof of the accused's mental attitudes with respect to the commission of those previous crimes. Thus, these statements were relevant to understanding the accused's utter contempt for the rules of law in the commission of the presently charged offenses.

[43] *See Gambini,* 13 M.J. at 429.

[44] M.R.E. 401, MCM, 1984.

[45] A.C.M.R. 8600407 (A.C.M.R. 30 Dec. 1987) (unpub.).

acts with a child, as the record was devoid of any foundation linking the magazine to the charged offense.[46]

In order to find the magazine admissible, the court in *Boulton* required a more immediate connection to the charged offenses than that offered by the government. For sentencing purposes, evidentiary admissibility was not met even though the magazine contained pornographic depictions of the acts of which the accused was found guilty, a narrative attempting to moralize sex with children, and frontal child nudity. Finally, the magazine was found in the same area where the accused had perpetrated the charged offenses.[47] Similarly, in *United States v. Martin*,[48] Chief Judge Everett found the government evidence of alleged prior child abuse to be ambiguous and remote in time.[49] In short, if there are matters sought to be introduced by the government through R.C.M. 1001(b)(4) that do not assist the trier of fact in applying the general sentencing philosophies enumerated above, such evidence should not be admitted for sentencing purposes.[50]

After a matter has been determined to be relevant, an inquiry should be made to ensure that the admission of the evidence is not limited by other applicable rules of evidence or procedure. Some of the rules commonly applicable to the introduction of aggravation evidence include, but are not limited to, M.R.E. 404(b), 403 and R.C.M. 1001(b)(5).

M.R.E 404(b)

Of considerable confusion is the application of M.R.E. 404(b)[51] during presentencing. In *United States v. Harrod*[52] and *United States v. Martin*,[53] M.R.E. 404(b) was implicitly interposed as a requirement for the introduction of aggravation evidence. In practice, defense counsel have argued that M.R.E. 404(b) is a rule of exclusion impacting directly on aggravation evidence. On the other hand, M.R.E. 404(b) has been employed by the government as a separate basis for admitting aggravation evidence. If M.R.E. 404(b) is not relevant to sentencing, then the government should not be permitted to introduce evidence on sentencing that proves solely identity, plan, etc. Evidence in aggravation of an offense can only be admitted when it explains a circumstance of the offense itself (i.e., directly related to) and then only if such evidence is relevant to a specific sentencing philosophy.[54]

The Army Court of Military Review in *United States v. Glazier*,[55] retreated from its earlier position of testing uncharged misconduct under M.R.E. 404(b) by explaining that such a requirement was not imposed by either *Harrod* or *Martin*.[56] In *Glazier*, the Army Court of Military Review provides a rational basis for the defense to argue that the rules governing sentencing practice do not require the application of M.R.E. 404(b) at all. Such evidence at sentencing is not admitted to show that an accused acted in a particular way and thereby prove an element of the charged offense. Instead, the evidence at the presentencing phase of the court-martial is being proffered to explain the circumstances of the offense and how such impacts upon one of the applicable sentencing philosophies.

The goal of sentencing is to determine those circumstances of the charged offense which warrant a specific sentence; however, uncharged misconduct is *not* to be used to establish that the defendant is generally an evil person.[57] The application of M.R.E. 404(b) is not adequate authority to permit admission of aggravation evidence simply because such information might have been admissible in a contested case to prove an accused's intent to commit the charged offense. Because the introduction of relevant sentencing evidence is not governed by the character of an accused's

---

[46] A.C.M.R. 8600407, slip op. at 1. *But cf.* United States v. Lipps, 22 M.J. 679 (A.F.C.M.R. 1986), *petition for review withdrawn*, 22 M.J. 366 (C.M.A. 1986) (Sexually explicit videotapes and literature admissible on findings to prove motive, intent, design, etc.); United States v. Mann, 26 M.J. 1, 4 (C.M.A. 1988) (On findings, accused's magazines were communicative of his sexual desires.)

[47] *Boulton*, slip op. at 2–3.

[48] 20 M.J. 227 (C.M.A. 1985).

[49] 20 M.J. at 233.

[50] *See* Berger, 23 M.J. at 615 (In finding that acts of uncharged misconduct were inadmissible under M.R.E. 403, the Air Force Court of Military Review relied in part upon the fact that the instruction to the members was unclear as to exactly what the sentencing authority was to determine from the evidence presented.)

[51] MCM, 1984 ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.")

[52] 20 M.J. 777, 780 (A.C.M.R. 1985).

[53] 20 M.J. 227, 230 (C.M.A. 1985).

[54] *Martin*, 20 M.J. at 232 (Everett, C.J. concurring) (emphasis added) ("[T]he government may offer evidence of prior misconduct to establish motive, intent or other state of mind . . . for sentencing purposes *to the extent* that the accused's state of mind is an aggravating circumstance that may be considered by the sentencing authority.")

[55] 24 M.J. 550 (A.C.M.R. 1987).

[56] 24 M.J. at 552–53 n.3. This reinterpretation of *Harrod* was accomplished despite the statement in United States v. Green, 21 M.J. 633, 636 (A.C.M.R. 1985), that the court has "carefully re-examined our holding" in *Harrod* and "adhere[d] to the conclusions contained therein."

[57] *See supra* notes 36–38 regarding the relevance of distribution offenses explained above.

pleas,[58] evidence relevant on findings should not be admissible on sentencing merely because such evidence may have been admissible on findings.[59]

Even though M.R.E. 404(b) should be found irrelevant to the sentencing process, counsel should be prepared to argue within the framework of the rule. Aside from the fact-specific analysis that questions whether the evidence proves anything other than bad character, counsel must determine whether the evidence is credible. Recently, in *United States v. Huddleston*,[60] the Supreme Court disposed of the purported preponderance of the evidence test and concluded that extrinsic act evidence is relevant only if the jury can reasonably conclude that the act occurred and the defendant was the actor.[61] Even though Congress intended M.R.E. 404(b) to expand the consideration of evidence and there are no restrictions limiting the scope of applicable evidence within the rule itself, the Court noted that any evidence considered must still be tested under M.R.E. 403.[62] Any further M.R.E. 404(b) analysis is superfluous as the rule is not designed to prove matters relevant to sentencing.

M.R.E. 403

Where evidence has been determined to be admissible, the evidence may be excluded if its probative value is substantially outweighed by risk of unfair prejudice.[63] Defense counsel must be prepared to preserve a M.R.E. 403 objection and not unduly relay upon the military judge's *sua sponte* obligation to test for such prejudice.[64]

Defense counsel should strongly urge the application of M.R.E. 403 whenever the uncharged misconduct is of a violent nature and the offenses charged are relatively nonviolent,[65] or when the uncharged offenses are similar, but more serious than those charged,[66] or when conduct was remote and of little significance[67] or when evidence concerns the lifestyle or family of the accused.[68] Concomitant with a review of the inflammatory nature of uncharged misconduct, defense counsel must also challenge the probative value of the evidence. The question must be whether or not the matter sought to be introduced is probative of a proper sentencing matter (i.e. deterrence, rehabilitation, retribution, etc.). Moreover, even if an incident of uncharged misconduct might be otherwise probative, the relative value of the evidence must be weighed qualitatively against the degree of passion that it will interject into the proceedings. In trial before court members, the defense can effectively limit nominal matters by demonstrating the very real risks that the accused will be punished for more than the charged offense.[69]

Finally, counsel should also consider the relative strengths of any aggravation evidence when urging the military judge to perform the balancing required under this rule. Defense counsel should ask the military judge to consider whether the alleged acts ever occurred or whether the accused was responsible for the action alleged. This additional analysis does not require that the occurrence of the similar act be proved by a preponderance of the evidence. Instead, the likelihood of the occurrence is relevant to a determination of the probative value.[70]

R.C.M. 1001(b)(5) as a Bar to Relevance

Despite the language of R.C.M. 1001(b)(5),[71] several opinions of the Army Court of Military Review have considered specific instances of misconduct as admissible evidence, probative of an accused's rehabilitative potential.[72] R.C.M. 1001(b)(5) is captioned as the rule that governs the introduction of "[e]vidence of rehabilitative potential." It is clear that the drafter's of the *Manual* intended

---

[58] *Martin*, 20 M.J. at 229 (citing United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982) ("[T]rial counsel may present evidence that is directly related to the offense for which an accused is to be sentenced, regardless of the nature of the accused's pleas.") As such, the nature of the plea is not outcome-determinative with regard to deciding whether evidence on aggravation is admissible. The preceding does not suggest that any evidence relevant on findings is automatically relevant and admissible during sentencing because this evidence must still meet "the admissibility tests of the rules and the Manual" first. *See Martin*, 20 M.J. at 230.

[59] In order to narrow the focus of information already admitted on findings, this analysis requires that the defense counsel request a limiting instruction under Mil. R. Evid. 105, MCM, 1984. The main point, however, is that whether one pleads guilty or not, *all* evidence used for sentencing purposes must be tested by the rules of evidence from the relevance standard applicable to establishing relevant sentencing concerns, not what is admissible on findings. *Cf.* United States v. Ratliff, A.C.M.R. 8600337, slip op. at 2 (A.C.M.R. 30 Sep. 1987).

[60] 56 U.S.L.W. 4363 (U.S. May 2, 1988).

[61] 56 U.S.L.W. at 4366.

[62] *Id.*

[63] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M.R.E. 403, MCM, 1984.

[64] *Green*, 21 M.J. at 636.

[65] United States v. Jones, 26 M.J. 54, 54–55 (C.M.A. 1988) (summary disposition) (The Court relied upon M.R.E. 403 to find aggravation evidence improper in a judge alone trial. The uncharged acts involved the communication of threats while the offenses charged were essentially disciplinary in nature.); *see also* United States v. Boles, 11 M.J. 195, 199–200 (C.M.A. 1981) (The introduction of uncharged violent acts of misconduct was error in the prosecution of an essentially nonviolent crime.); *but see Anderson*, 25 M.J. at 780–781 (Threats to prosecution witnesses were found to be relevant as they were communicative of appellant's state of mind.)

[66] *Berger*, 23 at 615; *Kinman*, 25 M.J. 99 (Prejudice may result even when a military judge is the sentencing authority.)

[67] United States v. Holloman, 46 C.M.R. 734, 735 (A.C.M.R. 1972) (Evidence of past juvenile misconduct presented to the convening authority in post trial review was too remote.); *contra* United States v. Slovacek, 21 M.J. 538, 541 (A.F.C.M.R. 1985).

[68] United States v. Mack, 25 M.J. 519, 522 (A.C.M.R. 1987).

[69] *Kinman*, 25 M.J. at 99; *Neil*, 25 M.J. at 801.

[70] *Huddleston*, 56 U.S.L.W. at 4366 n.6.

[71] MCM, 1984. "The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinion, concerning the accused's previous performance as a service member and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of misconduct."

[72] *Anderson*, 25 M.J. at 781; United States v. Cephas, 25 M.J. 832, 834 (A.C.M.R. 1988).

that only individuals with a thorough knowledge of an accused's background could evaluate the accused's potential for rehabilitation. Even then, normally, only the defense is permitted to test the actual knowledge of a witness by inquiring into specific acts.[73]

The Army Court of Military Review has relied upon specific instances of uncharged misconduct in order to assess the attitude of the defendant towards his offense and thereby conclude that the defendant has poor rehabilitative potential. In effect, trial counsel can offer uncharged misconduct of an accused as a substitute for the knowledgeable opinion of individuals who are subject to cross-examination.[74]

Even though the Army Court of Military Review has accepted evidence of specific acts of misconduct despite the language of R.C.M. 1001(b)(5), defense counsel must continue to object to the introduction of such aggravation evidence when the government's only theory of admissibility is the accused's rehabilitative potential.[75]

Conclusion

This article has attempted to lay a foundation necessary to promote proper receipt of sentencing matters by permitting aggravation evidence only if it is related to the charged offense. Most importantly, defense counsel must ensure that the trial counsel and the military judge specify their theory of admissibility for uncharged misconduct. Defense counsel must remind the military judge that the goal of sentencing is to determine an individual sentence for a defendant based upon the crime that was actually committed. The role of the sentencing authority in a court-martial is not to consider the unabridged history of an accused and thereby determine his or her fate. If that were the case, then the adversarial nature of our proceedings would have been abrogated in favor of federal presentencing procedures where an independent agency formulates a report and recommendation for the sentencing authority.[76]

Punishment for an uncharged offense is improper. Our rules of evidence and procedure are designed to prevent circumvention of this basic rule of sentencing. The Constitution does not seem to compel our rules of procedure on sentencing. However, the rules should be followed until the rules are changed. Otherwise, the interpretation and application of these rules will vary between different jurisdictions and will inevitably lead to disparate treatment of offenders.

Effective defense advocacy requires that the consideration of uncharged misconduct be limited to that evidence necessary to explain the crime for which the accused has been convicted—not those allegations that the prosecution has elected to withhold from a properly constituted court-martial.

[73] R.C.M. 1001(b)(5) analysis at A21–63. *See* United States v. Susee, 25 M.J. 538, 540 (A.C.M.R. 1987) (In determining rehabilitative potential, "inquiry into specific instances of conduct is not permitted on direct examination."); United States v. Jernigan, A.C.M.R. 8701572, slip op. at 2 (A.C.M.R. 31 Mar. 1988) ("[T]rial counsel exceeded the scope of proper foundation when, on direct examination, he elicited testimony of specific conduct by appellant.") In an effort to bring forth matters before the sentencing authority, it is now in vogue to designate specific instances of misconduct as foundational to a determination of rehabilitative potential. *Susee*, 25 M.J. at 540–541; *Cephas*, 25 M.J. at 832–833. The foundational approach turns the rule completely on its head. The cross-examination provisions of R.C.M. 1001(b)(5) are used against prosecution witnesses and for only the defense in order to guard against "unreliable information" against an accused. R.C.M. 1001(b)(5) analysis at A21–64. There are simply no Manual provisions that provide for government cross-examination of its own witnesses. Therefore, M.R.E. 405(a), is abridged by R.C.M. 1001(b)(5) to the extent that the government seeks to elicit specific instances of misconduct for purposes of rehabilitative potential. Recent cases have indicated that if defense opens the door, the government may inquire in rebuttal.

[74] In United States v. Horner, 22 M.J. 294, 296 (C.M.A. 1986), the Court found that the purpose of R.C.M. 1001(b)(5) was to allow the witness "to impart his/her special insight into the *accused's* personal circumstances." The use of specific acts of misconduct to determine rehabilitative potential excludes the "special insight" that was the purpose of the rule. Neither does consideration of specific acts allow for an evaluation of those acts in light of the accused's total background. Finally, those specific acts are not subject to cross-examination which was important to "guarding against unreliable information." R.C.M. 1001(b)(5) analysis at A21–62.

[75] United States v. Lawrence, 22 M.J. 846, 848 (A.C.M.R. 1986); *Berger*, 23 M.J. at 615.

[76] *See* R.C.M. 1001 analysis at A21–63. "The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports."

DAD Notes

Challenging the Challenges By Trial Counsel

In *United States v. Moore,*[1] the Army Court of Military Review, held that where the accused is a member of a racial minority and the government peremptorily challenges a member of the court-martial panel who is also a member of the accused's racial group, and the accused states an objection, the government will be required to provide a neutral explanation for the challenge.[2] The Army court explains that its *per se* rule is an adaptation of the equal protection principles articulated in *Batson v. Kentucky.*[3]

In *Batson,* the United States Supreme Court overruled a portion of its holding in *Swain v. Alabama,*[4] and held that an accused could make a *prima facie* case of purposeful discrimination in the selection of the venire based on the facts in his case alone without showing systematic action by

[1] CM 8700123 (A.C.M.R. 26 May 1988) (en banc) *pet. filed,* Dkt.No. 60,385AR (1 July 1988).

[2] *Moore,* slip op. at 10–11.

[3] *Moore,* slip op. at 8 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

[4] 380 U.S. 202 (1965).

prosecutors.[5] The Supreme Court explained that in order to establish a *prima facie* case of purposeful discrimination an accused (1) must show that he is a member of a cognizable racial group and that the prosecutor used his peremptory challenge against a venire member of the same race, (2) can rely on the fact that a peremptory challenge is a device that permits discrimination by those so inclined, and (3) must show that the circumstances of the case raise an inference that the prosecutor used a peremptory challenge to exclude a venire member on account of race.[6]

In *Moore*, the accused was black and the trial counsel used his single peremptory challenge against the senior of the two black members on the panel (Major H). The defense counsel promptly objected to the challenge on the grounds that it may have been racially motivated and, citing *Batson*, asked the military judge to question trial counsel concerning his reasons for the challenge. Because both the military judge and trial counsel were unfamiliar with the holding in *Batson*, a recess was ordered. After the recess, defense counsel explained that trial counsel had conducted no individual voir dire of Major H and that Major H had provided no unusual answers during general voir dire. The military judge held that he did not believe that *Batson* applied to courts-martial and even if it did, defense counsel had failed to establish a *prima facie* case of purposeful discrimination.[7] However, the military judge provided trial counsel an opportunity to state his reasons for the challenge, which trial counsel expressly declined to do.[8]

The Army Court of Military Review, while holding that the *reasoning* expressed in *Batson* could not directly apply to the military "due to the substantial legal and systemic differences between courts-martial and civil prosecutions,"[9] created a *per se* rule requiring trial counsel to explain any peremptory challenge against a member of the accused's race.[10] This holding eliminates the need for the defense to present a *prima facie* case of purposeful discrimination prior to requiring trial counsel to explain a challenge.

Litigating the issue of purposeful racial discrimination at trial helps assure the public and, most importantly, the accused, that race will not be used as a factor in selecting the court members who will decide the issue of guilt and punishment. The Army court's practical application of its new rule to the facts in *Moore*, however, is disturbing and may be misleading to practitioners in the field. In *Moore*, the Army court ordered trial counsel to provide an affidavit explaining his challenge.[11] Trial counsel's affidavit cited prior dealings on military justice matters with Major H and quizzical looks by Major H to several of the military judge's standard questions as reasons for believing Major H might be easily confused in a complicated trial. As explained by Senior Judge Adamkewicz in his separate opinion, trial counsel's explanation was not supported by the record and appeared pretexual.[12] Consequently, the majority opinion creates at least the impression, if not the reality, that any explanation short of admitting racial motivations will be acceptable. Such an application appears to render the *per se* rule meaningless and negate the Supreme Court's stated intent in *Batson*.

The Army court's opinion in *Moore* creates numerous dilemma for trial defense counsel. Neither the Supreme Court nor the Army court explained whether trial counsel must confine his explanation to matters that took place in the accused's trial, or whether trial counsel may cite to extra-record facts that neither the military judge nor defense counsel can easily challenge or verify.[13] Both courts also failed to address what role, if any, defense counsel will be allowed to play in regard to litigating the sufficiency of trial counsel's explanation.[14] Although the Army court may have theoretically created a procedure applying the principles of *Batson* to courts-martial, trial defense counsel must be diligent to ensure that the procedure is applied in a way that honestly facilitates the intent of *Batson*, and is not merely a meaningless ritual with no substantive effect. Captain Scott A. Hancock.

The Sky Is Not the Limit: Keeping Sentences Within the Pretrial Agreement

Two recent decisions by the Army Court of Military Review remind practitioners that sentence limitations contained in pretrial agreements are not to be exceeded because of unexpected or unplanned conditions. An adjudged sentence that contains a punishment not specifically agreed

---

[5] *Batson*, 476 US. at 96.

[6] *Id.* at 96–98.

[7] *Moore*, slip op at 2–4.

[8] *Id.* at 4.

[9] *Id.* at 8.

[10] *Id.* at 10–11.

[11] *Id.* at 14. *But see* People v. Hall, 672 P.2d 854, 860 (Cal. 1983) (court specifically rejected the remedy of allowing prosecutor the opportunity to explain a challenge after the appellate court found a *prima facie* case of purposeful discrimination).

[12] *Id.* at 23–25. *Batson* states that "the [prosecutor's] explanation [for a peremptory challenge] must be (1) neutral, (2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate." State v. Butler, 731 S.W.2d 265, 268 (Mo.App. 1987); *see also* State v. Slappy, 522 So.2d 18 (Fla. 1988); and Blacksheer v. State, 521 So.2d 1083 (Fla. 1988).

[13] For instance, may a trial counsel claim that he met the subject court member at a social function and thereafter formed a negative opinion of him, or that he was informed by another trial counsel that the subject count member had previously asked pro-defense questions? *See* United States v. St. Fort, 26 M.J. 764 (A.C.M.R. 1988) (court holds that explanation for challenge need not necessarily be subject of voire dire); *but see* State v. Butler, 731 S.W.2d at 268 (" 'Rubber stamp' approval of nonracial explanations, no matter how whimsical or fanciful, would cripple *Batson's* commitment to 'ensure that no citizen is disqualified from jury service because of his race' " (*quoting Batson*, 476 U.S. at 99)). *See also* Stewart, Court Rules Against Jury Selection Based on Race, 72 A.B.A.J. 68, 70 (1986) ("[A]ny prosecutor's office could develop a list of 10 to 15 standard reasons for striking a juror. . . .").

[14] For instance, may a defense counsel cross-examine trial counsel with regard to his explanation, and may defense counsel present evidence to rebut trial counsel's explanation? *See* United States v. Thompson, 827 F.2d. 1254 (9th Cir. 1987), and United States v. Garrison, No. 87–7649 (4th Cir. June 7, 1988) (LEXIS, Genfed Library, U.S. App. File) (*in camera, ex parte* examination of prosecutor's motives for excluding blacks from jury was improper); *contra* United States v. Davis, 809 F.2d 1194 (6th Cir. 1987) (*in camera, ex parte* examination of prosecutor's motives is appropriate procedure under *Batson*).

upon by the parties should not be approved when that punishment exceeds the limits of the agreement.[15]

In *United States v. Walker*,[16] the Army court held that a sentence that included a period of additional confinement as an enforcement provision in the event of the nonpayment of the adjudged fine, could not be approved as to that additional confinement. Specifically, the accused was sentenced, *inter alia*, to confinement for six years and a fine of $18,878.00, with an additional confinement of 36 months if the fine was not paid prior to the completion of the original term of confinement. The accused had negotiated a pretrial agreement to limit his sentence, *inter alia*, to five years confinement and a fine (of an unspecified amount). The convening authority, according to his interpretation of the pretrial agreement, approved, *inter alia*, five years' confinement and the entire fine together with the enforcement provision.

The Army court held that the contingent confinement provided for as an enforcement provision to the adjudged fine impermissibly exceeded the limitations of the agreed-upon confinement period. This holding was based upon the finding that the record did not indicate "that the appellant understood that the convening authority could approve an enforcement provision which would extend the agreed upon limitation of confinement. . . . Nor [did the Court] find any express or implied condition in the pretrial agreement providing notice that the confinement limitation might be enlarged by an enforcement provision for the nonpayment of a fine."[17]

In *United States v. Grassie*,[18] another panel of the Army court held that the convening authority erred in approving an adjudged sentence of, *inter alia*, confinement for one year and total forfeiture when the pretrial agreement limited the punishment to, *inter alia*, confinement for 18 months and total forfeitures for 18 months. The error occurred in approving "total forfeitures" for an unlimited duration."[19] Since the terms of the pretrial agreement limited forfeitures to a definite, maximum period, the approved sentence exceeded the limitation on forfeitures.

Therefore, trial defense counsel's attention to detail is as important after a client is sentenced as it is during the pretrial agreement negotiations and the trial.[20] Counsel can ensure a client's full understanding of the terms and effects of a pretrial agreement through client education before trial, vigilance at trial, and legal argument to the convening authority after trial.[21] If the agreement did not contemplate "other lawful punishments," enforcement provisions, escalator clauses, or other unusual punishments, clear evidence of a client's awareness of the limits of the agreement will control the enforcement of the agreement negotiated. Captain Brian D. DiGiacomo

The Waiver Doctrine

A recent memorandum opinion of the Army Court of Military Review illustrates how severely the actions of trial defense counsel can limit their clients' appellate relief. In *United States v. Christian*,[22] the government charged clearly multiplicious specifications alleging larceny of $130.84, $513.90, and $450.00, and the corresponding forgeries in the making of checks in amounts of $130.84, $513.90, and $450.00.

On appeal, counsel sought to have the multiplicious specifications dismissed. In its decision denying relief, the Army court noted:

> At trial, the defense counsel did not file a motion to make more definite and certain, a motion for a bill of particulars, or a motion to hold the specifications multiplicious for either findings or sentence. The military judge, after hearing the providency inquiry, *sua sponte* advised the parties that he considered the specifications multiplicious for sentencing purposes.
>
> It is incumbent upon the trial defense counsel to raise the issue of multiplicity before the trial court. Where, as here, the issue of multiplicity is raised for the first time on appeal this court will examine the language of the specifications on which the case was tried to determine whether the specifications in questions fairly embrace each other. However, this court will not go behind the specifications in issue here to determine such claims. . . . The only common factors between the forgery and larceny specifications are the dollar amount alleged within the respective specifications. Such common factors alone are insufficient to support appellant's allegations of multiplicity. Accordingly, we find that the forgery specifications are not multiplicious with the larceny specifications.

Christian, slip op. at 2 (citations omitted).

The *Christian* decision again highlights the critical necessity to anticipate and fully litigate issues at trial. The Court of Military Appeals recently indicated that the issue of multiplicity for findings is not waived by trial defense counsel's

---

[15] *See, e.g.*, United States v. Hodges, 22 M.J. 260 (C.M.A. 1986) (despite the fact that commuting an adjudged dishonorable discharge to an additional twelve months confinement was an obvious benefit to accused, the additional confinement could not be approved because it exceeded the period of confinement contained in the pretrial agreement); United States v. Edwards, 20 M.J. 439 (C.M.A. 1985) (convening authority cannot approve an adjudged fine *in addition to* total forfeitures when the possibility of a fine is not contained in the pretrial agreement).

[16] CM 8701913 (A.C.M.R. 28 June 1988).

[17] *Walker*, slip op. at 2. Citing *Hodges* and *Edwards*, the court focused on the accused's "reasonable belief" of the limitations contained in the pretrial agreement. Such concern stems from notions of "elemental fair play." *See* United States v. Williams, 18 M.J. 186, 189 (C.M.A. 1984).

[18] CM 8702821 (A.C.M.R. 29 June 1988) (unpub.).

[19] *Id.* slip op. at 1; *see generally* United States v. Thompson, 45 C.M.R. 761, 762–63 (N.C.M.R. 1971); United States v. Thornton, 34 C.M.R. 958, 963 n.5 (A.F.B.R. 1964).

[20] The military judge has a duty to ensure the accused's understanding of the pretrial agreement limitations, and that the accused, both counsel, and the military judge all agree on the interpretation of the pretrial agreement. United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. King, 3 M.J. 458 (C.M.A. 1977).

[21] *See* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105, 1106.

[22] CM 8800163 (A.C.M.R. 18 July 1988) (unpub.).

failure to raise it.[23] Different panels of the Army court are analyzing and applying the waiver doctrine differently, however. Thus, the best and safest course of action for trial defense counsel is to evaluate all specifications for possible multiplicity and raise the issue at trial when warranted. Without such efforts, your client may be denied relief on appeal. Captain William J. Kilgallin

The Long and Short of It: Building on the Speedy Trial Rule

The Army Court of Military Review recently examined exclusions from the speedy trial rule[24] based on good cause[25] and defense delay.[26] In an unpublished decision, *United States v. Longhofer*,[27] the court reviewed the closed trial of the former Chief of Army Special Operations. The accused's court-martial commenced 261 days after the preferral of charges.[28] The Army court held that the government failed to show good cause for delaying Colonel Longhofer's court-martial for more than 120 days. The court also found that the military judge improperly classified government processing time as defense delay. The court dismissed the charges and specifications.[29]

In *Longhofer*, the court defined several rules that defense counsel should be aware of. First, the good cause exclusion is not available to the government when trial counsel fail to act with due diligence in processing a case for court-martial. Second, the same time required by both the government and the defense is not excludable as a defense delay. Third, if the government diverts a participant necessary to the proceedings to perform other military duties, the government must demonstrate good cause to exclude any resultant delay. Fourth, the government is accountable for all delay caused by the investigating officer.

The Good Cause Exclusion Requires Due Diligence

The Manual for Courts-Martial, United States, 1984, allows for the exclusion of periods of time from the 120 day limitation if the government demonstrates good cause for the exclusion.[30] In *Longhofer*, the court applied the two-step analysis of good cause established by the Army court in *United States v. Durr*.[31] In *Durr*, the court stated that the interest in a speedy trial must be weighed against the needs served by a delay in trial. The *Durr* court then created a two-step analysis to balance these factors. First, a court must analyze the event "to determine whether the event is of the type that may justify a delay. If so, the second inquiry is whether a nexus exists between the event and any delay in trial."[32]

Because *Longhofer* involved classified evidence, the government required all parties to the trial to obtain special security clearances. The government cleared the entire prosecution team prior to preferral of the charges, but failed to clear the investigating officer[33] or civilian defense counsel until after preferral. The periods of delay caused in obtaining these clearances were at issue. The Army court stated that it would not define time limits necessary to clear a person unless the period became unreasonable. The court then affirmed the military judge's exclusion, under the good clause provision, of 17 days used to grant the special security clearance to the investigating officer.[34] The court concluded that the record failed to indicate that 17 days was an unreasonable amount of time.

In contrast, the court ruled that the military judge erroneously excluded, under the good cause provision, 36 days used to grant the civilian defense counsel a special security clearance. Evidence indicating that the clearing procedure took less than one week convinced the court that the government failed to act with reasonable diligence.[35] The *Longhofer* court declared that the government must pursue pretrial matters with reasonable diligence before a court can exclude time from the required 120 days for good cause.[36] Under the court's analysis, if the government fails to act with due diligence, then the *Durr* requirement of nexus cannot be met because the lack of due diligence, not the event, caused the delay.[37]

Time Used By The Government Is Government Time

The military judge excluded two time periods as defense delay when the government was not ready to go to trial. First, the military judge excluded seven days as defense delay in commencing the UCMJ article 32 investigation. After the civilian defense counsel received his security clearance, he requested a two day delay to review the case file. The government, however, postponed the investigation for an additional four days to procure witnesses. The

---

[23] United States v. Madril, 26 M.J. 87 (C.M.A. 1988) (summary disposition).

[24] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 [hereinafter R.C.M.].

[25] R.C.M. 707(c)(9).

[26] R.C.M. 707(c)(4).

[27] CM 44919 (A.C.M.R. 30 June 1988) (unpub.).

[28] Record at 242.

[29] United States v. Longhofer, CM 44919, slip op. at 8 (A.C.M.R. 30 June 1988) (unpub.).

[30] R.C.M. 707(c)(9).

[31] 21 M.J. 576 (A.C.M.R. 1985).

[32] *Id.* at 578. The *Durr* analysis was adopted by the Navy-Marine Court of Military Review in United States v. Lilly, 22 M.J. 620 (N.M.C.M.R. 1986).

[33] The investigating officer was appointed under the Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

[34] *Longhofer*, slip op. at 2–3 (citing United States v. Demmer, 24 M.J. 731, 734–35 (A.C.M.R. 1987) (holding that 72 days for a mental examination was not unreasonable)).

[35] *Id.* at 3–6.

[36] The court allowed three weeks as an outside limit for the reasonable time to obtain the security clearance for the civilian defense counsel. The court did not intend to establish a limit for a reasonable clearing period but determined that this period was reasonable according to the facts of this case. Quoting *Demmer*, the court stated that the time used to clear a person must not be unreasonable, onerous, or excessive. *Id.* at 3.

[37] *Id.* at 6.

Longhofer court held that the military judge erred by attributing the entire seven days to the defense. The court explained that the two days of defense delay lacked a causal relationship with the commencement of the investigation because the government needed the time to gather witnesses. The court did count the seventh day as defense delay because that delay resulted from a conflict in the civilian defense counsel's schedule.[38]

Second, the military judge excluded 61 days used by the defense to obtain witnesses and to allow for the presence of civilian counsel for closing argument. The Army court attributed two of those days to the government because the government used the time to present witnesses and sworn statements.[39] Thus, if the government delays a court-martial to prepare or present the government's case, then the period is not excludable as a defense delay. This rule applies even if the defense required the same time to prepare the accused's case.

Delay Caused By Conflicting Military Duties Is Government Time

Additionally, the court held the government accountable for a delay caused by the diversion of a witness to perform other military duties. During the UCMJ article 32 investigation, the defense counsel requested the production of a general officer as a witness. Subsequently, the government scheduled the general to testify on a specified date. The general, however, received an order for a temporary duty assignment and did not testify until eight days after the scheduled date. The Army court refused to exclude this period under the good cause provision because the government failed to provide sufficient justification for the witness' absence. Therefore, when the government causes the absence of a participant necessary to the proceedings, it must provide sufficient justification to merit exclusion for good cause.[40]

The Government Is Accountable for IO Delays

Finally, the *Longhofer* court attributed a period of time to the government simply because the government was responsible for the delay. At the court-martial, the military judge excluded 14 days because of the unavailability of the detailed defense counsel and defense witnesses. The Army court ruled that the defense was responsible for only ten days of the delay. The government used the remaining four days to produce government witnesses and other witnesses that the UCMJ article 32 investigating officer considered essential.[41] Because the investigating officer acts on behalf of the government, the delay he caused must be attributed to the government.[42]

Conclusion

The Army Court of Military Review found that the military judge erred in excluding a total of 55 days. The court added these days to the government's processing time and held that the government violated the accused's right to a speedy trial.[43]

The *Longhofer* decision illustrates the significance of challenging and litigating any delays that occur before a court-martial. One day can be the difference between benign neglect and violation of a guaranteed right. Defense counsel should carefully document and account for every period of time that precedes the disposition of a case by court-martial. Counsel must fully litigate any delay greater than 120 days and force the government to justify its actions or inaction.[44] This challenge will preserve the speedy trial issue to ensure complete litigation.[45] Mr. Michael S. Rankin, Legal Intern.

Regulatory Law Office Note

Gas Utility Service

The opportunities for engineers, procurement officers and lawyers to consider alternative gas supply options for Army installations continue. The Engineering and Housing Support Center (CEHSC-UC) at Fort Belvoir, VA is endeavoring to make available technical assistance to many major installations. This assistance will help engineers: (1) determine the range of gas procurement options available; (2) assist in technical matters related to preparation of a request for proposals (RFP); and (3) assist in technical matters related to evaluation of responses to the RFP. Details regarding this technical assistance may be obtained by facilities engineers through their chain of command.

The regulatory environment of the gas utility industry has continued to offer opportunities for reducing the cost of gas utility service on installations. The basic trend in gas rate regulation discussed in the Regulatory Law Office Note in the November 1986 and September 1987 issues of *The Army Lawyer*, remains intact. The developments discussed in those articles will not be reiterated here. The Federal Energy Regulatory Commission (FERC) and many state regulatory commissions continue to foster a regulatory climate that maximizes the competitive options available to purchasers of gas utility service. Most of these programs are an outgrowth of Order No. 436, FERC Docket No. RM

---

[38] The court noted that the lack of the government counsel's knowledge about clearing procedures did not excuse the government for delaying the proceedings. *Id.* at 5, n.10.

[39] *Id.* at 8.

[40] *Id.* at 7.

[41] *Id.* at 6–7.

[42] The court expanded the holding of the Court of Military Appeals in United States v. Carlisle, 25 M.J. 426 (C.M.A. 1988). In *Carlisle*, the Court of Military Appeals stated that "each day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record." *Id.* at 428. In *Longhofer*, the court found that the UCMJ art. 32 investigator could grant defense delays because he was acting as the convening authority's representative. *Longhofer*, slip op. at 8 n.13.

[43] *Longhofer*, slip op. at 8. The court added 55 days to 119 days of government pretrial accountability. The court then assumed, *arguendo*, that the government's accountability started at ninety-one days. Thus, the court calculated an alternate total of one hundred and forty-six days of pretrial delay. *Id.*

[44] The speedy trial limit is 90 days if the accused is in pretrial arrest or confinement. R.C.M. 707(d).

[45] R.C.M. 907(b)(2)(A).

85–1–000, 9 October 1985, 50 Fed. Reg. 42,408, 18 October 1985.

Initially, the courts perceived problems with Order No. 436 and directed the FERC to resolve those issues, *Associated Gas Distributors* v. *FERC* 824 F2d 981 (CADC 1987), *cert. den., sub nom. Interstate Natural Gas Association* v. *FERC* 108 S. Ct. 1468 (1988). These were addressed in Order No. 500, the interim rule, FERC Docket No. RM 87–34–000, dated 7 August 1987, 52 Fed. Reg. 30334, dated 14 August 1987. The latter ruling of the FERC has been subject to some refinement, but continues as Order No. 500–E, FERC Docket No. RM 87–34–055, 6 May 1988, 53 Fed. Reg., 16859–16862, dated 12 May 1988. The federal courts have apparently accepted FERC's regulatory resolution of the issues.

In instances where installations find it economical to acquire gas supplies using transportation services of a pipeline, or of the local distribution utility, rather than traditional gas utility services, the tariff rate for that service may be incorporated in the gas supply contract, under procurement regulations. The tariff rate, however, may change.

The installation must receive timely notice of any changes in the applicable tariffs, whether regulated at the state of federal level, which will be passed through in billings to the installation under the gas supply contract. Existing utility service contracts often contain such notice provisions. When a notice of increase or change in tariff rates is received, forward it to the Regulatory Law Office (JALS–RL), in accord with AR 27–40.

Contract Appeals Division Note

Judge Advocate Responsibilities in ADPE Procurement

Several decisions in recent bid protests before the General Services Board of Contract Appeals (GSBCA) make it clear that some judge advocates are either being bypassed in ADPE procurements in excess of $100,000, or are only superficially involved. As we attempt to defend these protests, several factors consistently emerge:

(1) Any significant ADPE procurement is likely to be protested before the GSBCA;

(2) Judge advocates are often unaware of the vulnerability of ADPE procurements to GSBCA protests, the staggering costs incurred through suspended or delayed procurements, the payment of proposal costs and protest expenses, and the overall disruption to the procurement process which protests cause;

(3) ADPE procurements with no legal review have little likelihood of surviving a protest;

(4) Commands where lawyers work closely with procurement personnel are much more successful in defending against protests.

In one GSBCA decision, the evaluation criteria were not followed by the technical evaluation team. Scoring procedures did not reflect the relative weights provided in the criteria given to the bidders. The result was an undefendable post-award protest that resulted in summary judgment for two protesters, attorney's fees of approximately $60,000, and the possibility of bid preparation costs assessed against the Army in excess of $200,000.

In another decision, an award was improperly made using the wrong GSA schedule based on a contractor's false assurance that the items were in fact on the schedule. The procuring office never saw the schedule itself prior to making the award, and was not even aware that the items it was buying were ADPE. This protest was finally settled. The Army had to pay attorney's fees and ultimately issued a letter of admonishment to the contracting officer involved. Failure to settle might have subjected the Army to a complete or partial withdrawal of the blanket delegation of procurement authority from GSA.

In neither protest was there any legal review prior to award.

In a third case, the procuring activity impermissibly shortened the statutory solicitation period without obtaining a waiver at the appropriate level. This error was caught by the reviewing attorney, but he failed to tell the contracting officer the precise corrective procedures to follow. This error resulted in summary judgment for the protestor and a claim for attorney's fees in excess of $23,000.

These three cases illustrate the absolute need for careful legal review of all ADPE procurements by Staff Judge Advocate offices with any procurement responsibility, both in the presolicitation stage and prior to award. Staff Judge Advocates must aggressively seek to monitor and review procurements, particularly those subject to protest before the GSBCA. Staff Judge Advocates must ensure that at least one attorney in the office is adequately trained to review procurements. Judge advocates cannot merely wait for the contracting officer to ask for a legal review. They must have a close working relationship with the local Directorate of Contracting. It is not enough merely to point out an error; contracting personnel must be shown what to do and how to do it. Failure to do so may result in canceled awards, massive attorney's fees, and sanctions against the Army as a whole, not just the procuring activity at fault. COL Cundick and LTC Long.

SJA, See to Your SOP!

Staff Judge Advocate, examine your standing operating procedures (SOP) for the post-trial administrative processing of general courts-martial and special courts-martial involving a bad-conduct discharge. If the answers to the following questions are "yes" (a score of less than 100% is unsatisfactory) and your SOP is followed, you will save other JA offices from having to do extra work because of your oversights.

a. Does your SOP require that each record of trial sent to the Judiciary for appellate review or examination include a specific statement by the accused indicating whether he or she wants to be represented by appointed counsel or intends to be represented by civilian counsel (or both) or waives the right to counsel? (See AR 27–13, CMR Rule 10; DD Form 494, item 46b.) If you receive an information copy of our request that the accused's new SJA obtain the missing statement, you know your office failed to have the record completed.

b. Does your SOP require that the cover of the original copy of the record of trial (and, preferably, the defense copy, too) include the names of any companion cases or the phrase "No companion cases," and the names of any other cases involving a witness or victim? (See AR 27–10, paras. 5–31, 13–6.) Failure to observe this protocol may delay a case by requiring it to be reassigned among panels of ACMR, or by requiring a change of appellate defense counsel because of a late-discovered conflict of interest.

c. Does your SOP require that the additional copy of the record required for use of the Army Clemency Board be marked "Clemency Copy"? (See AR 27–10, paras. 5–31*a*, 5–35*a*.) Failure to do this may result in the confinement facility misdelivering that copy to the accused, whose own copy sometimes arrives only later after being used by the trial defense counsel in post-trial proceedings.

d. Does your SOP require that, when the accused has been transferred to the U.S. Disciplinary Barracks (USDB) or U.S. Army Correctional Activity (USACA), copies of the initial promulgating order be sent in accordance with subparagraph 12–7*b*(6), Army Regulation 27–10? Finance officers and clemency sections, among others, need these to adjust pay and determine eligibility.

e. Does your SOP also require that *corrected* copies of promulgating orders be sent as indicated in d, above? (Although not mentioned specfically in AR 27–10, the requirement should be self evident.) Failure to do this may feed errors into orders issued by the confinement facility, especially the final order. Result: A corrected final order must be prepared.

f. Does your SOP require that communications issued under the authority line of The Judge Advocate General and setting a suspense date be responded to? Specifically, we are referring to correspondence sent by the Clerk of Court asking for the status of cases tried 90 days earlier. A significant percentage of such letters receive no reply. To avoid future embarrassment, we recommend your SOP require that those letters receive the SJA's personal attention.

g. Does your SOP require that two copies of each supplementary court-martial order issued be sent to the SJA of the command that convened the court and, if a different command took the initial action, to the SJA of that command. (AR 27–10, paras. 12–7*e*(1) and (3).) Failure to do this delays disposition of items of evidence (AR 190–22), disposition of trial tapes (AR 27–10, para 5–32*b*), and disposition of the retained record (AR 25–400–2). It also burdens the Judiciary with requests by original convening authorities for a records search to determine whether a case has been closed. (This question is mainly for those few installations where final orders usually are issued. Other SJA's, see h, below.)

h. Does your SOP instruct what is to be done when a final supplementary order (g, above) is *received* pertaining to a case tried in the command? (For starters, see the references cited in g, above.) SJA's who complain that their offices do not receive copies of the final orders sometimes find, instead, that the person who received the copy did not understand what to do with it.

Now is the time to see whether your office's SOP covers those points.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Note

DOD Inspector General Investigates Navy-Marine Court of Military Review

The DOD Inspector General (IG) is investigating an anonymous tip that the Navy-Marine Court of Military Review (NMCMR) was the subject of illegal lobbying and bribery in the highly publicized court-martial of Cdr (Dr.) Donal M. Billig. Billig, a Navy doctor, was a cardiothoracic surgeon and the chief of the Cardiothoracic Surgery Department at the Naval Hospital, Bethesda, Maryland. He was charged with 24 specifications of dereliction of duty for failing to have a supervisory surgeon present during open-heart surgeries and 5 specifications of involuntary manslaughter. Billig was convicted, *inter alia*, of two specifications of involuntary manslaughter and sentenced to four years confinement, total forfeitures, and dismissal from the service. On appeal, however, the case was overturned by

the NMCMR (en banc) based on insufficiency of the evidence.[1]

A new controversy has arisen, however, concerning the manner in which the appellate decision was reached. Based on a tip received over the DOD "hotline" that improper pressures were brought to bear on the NMCMR, the IG launched an investigation with the aid of The Judge Advocate General of the Navy. The commissioners of the NMCMR were ordered to be available at 0930 hours, 30 June 1988, to be interviewed by IG investigators. The NMCMR, however, claiming judicial privilege, sought and received a temporary restraining order from the Court of Military Appeals, and the matter was set for oral argument on 11 July 1988. On 22 July 1988, Chief Judge Everett delivered the opinion of the court.[2]

Jurisdiction

The first issue the court addressed was the court's power to hear the petition for extraordinary relief. Noting that in situations where a military commander exercised influence on a court-martial the court had not hesitated to grant extraordinary relief, the court found no difference when the threat to the integrity of the military justice system originated with civilian authority [the IG].[3] Moreover, the court found the case fell within the court's "potential appellate jurisdiction."

Generally, there are three ways that a case falls within the jurisdictional limits of the Court of Military Appeals in acting in "aid of their jurisdiction" under the "All Writs Act."[4] First, the case can fall under the statutory jurisdiction of the court under article 67, UCMJ.[5] Second, the case can fall under the potential jurisdiction of the court. That is usually an interlocutory appeal where a case is pending and the sentence, if adjudged by the court-martial, potentially could meet the statutory jurisdiction of the court. Third, the court has recognized its "supervisory authority" to hear some issues to guarantee the integrity of the military justice system.[6]

In the case at bar, however, the court stretched the definition of its potential jurisdiction past cases being tried to cases that *might* be tried someday. The court held that because Chief Judge Byrne of the NMCMR was subject to being charged with disobedience of orders if he disobeyed the Navy Judge Advocate General's order to produce witnesses and documents, he could be tried by a general court-martial and be subject to the maximum punishment, which would include up to 5 years confinement. Thus, the court believed this case was in its "potential appellate jurisdiction."[7]

Merits of the Petition

The court then turned to the merits of petitioner's application. First, the court recognized that there was a judicial privilege protecting judicial communications, and that the privilege was essential to the effective discharge of judicial duties. The court explained, however, that the privilege was qualified and in some cases must yield to other considerations. Second, the court looked at the IG's assertion that its investigation would not intrude into the "court's deliberative process" and determined that there was a substantial risk that some areas of judicial privilege would be infringed upon and that an anonymous tip did not suffice to justify a limitation on the privilege. Thus, the court held that it was necessary to provide the NMCMR relief and protect its judges and staff.[8]

Remedy

The last decision for the court was how to implement its protective order. While noting that Congress had not explicitly chosen a vehicle to consider allegations of misconduct by judges in the military justice system, the Court of Military Appeals held that it was within the inherent authority of the court to create an internal procedure for investigating complaints of judicial misconduct.

The court initially considered appointing a judicial commission but decided "that the simplest and quickest way to proceed is for the judicial commission to be this court itself, *qua* court."[9] Accordingly, the court appointed Judge Walter T. Cox III as Special Master to inquire into the allegations, relying on his previous experience as a state trial judge and service on several state judicial commissions. Subject to appeal to the full court, Judge Cox has been provided with broad discretionary powers, both to protect the deliberative process of the NMCMR and to investigate any allegations of misconduct when and if provided with something more than an anonymous tip. The case is pending. MAJ Williams.

---

[1] United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988).

[2] U.S.N.M.C.M.R. v. Carlucci et al., 26 M.J. 328 (C.M.A. 1988).

[3] Interestingly, the court cited United States v. Thomas, 22 M.J. 388 (C.M.A. 1986) as the authority for this proposition. *Thomas* did not involve an extraordinary writ nor was any extraordinary relief granted although it did involve command influence. Command influence has, however, been the subject of extraordinary relief.

[4] 28 U.S.C. § 1651(a) (1982). The Supreme Court recognized the Court of Military Appeal's authority under the All Writs Act in Noyd v. Bond, 395 U.S. 683 (1969).

[5] Uniform Code of Military Justice article 67, 10 U.S.C. § 867 (1982) [hereinafter UCMJ].

[6] Mcphail v. United States, 1 M.J. 457 (C.M.A. 1976); *see* Jones v. Commander, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J. dissenting).

[7] This greatly broadens the jurisdictional reach of the Court of Military Appeals. Under this theory, any time a soldier disobeys an order or faces the prospect of disobeying an order, he falls within the potential jurisdiction of the Court of Military Appeals.

[8] Carlucci, 26 M.J. at 342.

[9] *Id.* at 340.

Administrative Law Note

Environmental Law Instruction

The U.S. Department of Justice's Office of Legal Education annually presents a number of very worthwhile CLE classes at various locations around the country. One of their best offerings is a 3-day session entitled "Dynamics of Environmental Law," which includes an overview of the background and current developments in just about all areas of environmental concern. The classes are presented mostly by DOJ and EPA personnel, and they are designed for federal lawyers.

The next session is scheduled for November 16–18 in Washington, D.C. Enrollment is limited, and the normal application deadline is October 14, 1988, but it may be fruitful to inquire about available slots after this date. The Legal Education Office's phone number is (202) 673–6372 (or FTS 673–6372), and the address is Legal Education Institute, Department of Justice, P.O. Box 53061, Washington, D.C. 20009. Even if a quota cannot be obtained for this course, it may be a good idea to ask to be included on the mailing list to learn of future courses offered in Washington and elsewhere. MAJ Guilford.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

The June issue of *The Army Lawyer* contained an article by Mr. Mark Sullivan entitled "Lawyer Referral . . . Do's and Taboos." The article contained a reference to a "Take-1" pamphlet that is used at Fort Bragg, and referred the reader to a copy of the pamphlet "printed below." Unfortunately, because of space limitations, the pamphlet could not be reproduced, and the reference to it should have been deleted. The pamphlet provides an overview of the relationship between attorneys and their clients, and contains information on such topics as choosing an attorney, confidentiality, fees, and the relationship between legal assistance officers and private attorneys. Pamphlets that provide this type of general information are a helpful adjunct to the initial interview, and provide the answers to many commonly asked questions.

Premobilization Assistance

An Army Reserve component attorney recently examined one unit's approach to providing premobilization assistance. The findings and conclusions, which are discussed in this note, highlight problems that may exist elsewhere and that may require remedial efforts.

The practice in his area involves sending attorneys out to units to present personal affairs classes, as required by various directives. *See, e.g.,* TJAG Policy Memo 88–1, Reserve Component Premobilization Legal Preparation, 4 April 1988, *reprinted in* The Army Lawyer, May 1988, at 3. At the conclusion of these briefings, soldiers have an opportunity to consult with counsel, and many request wills during these sessions. The attorney then fills out will worksheets and takes them back to headquarters for the actual will preparation; this practice is necessary because the unit does not have enough computers for the attorneys to prepare wills on the spot.

Unfortunately, it may be months (typically 9 months or more) before an attorney (usually not the one who originally interviewed the soldier) is scheduled to return to the unit for will execution, and even then the process does not always run smoothly. The soldier may be unavailable on the day the attorney returns; the soldier's marital or family status may have changed in the interim; the unit may claim it cannot spare the personnel and time necessary to execute and witness a large number of wills; the soldier may have transferred out of the unit or out of the Guard; the will may contain errors and therefore require retyping; or, the worksheet may have been misplaced or lost, so the will the soldier is expecting does not yet exist. In all these cases, there is yet another considerable delay before an attorney can correct the errors and again attempt to coordinate execution.

Perhaps as many as a third of the wills prepared in this manner are subject to at least one of these problems, resulting in processing times frequently approaching 2 years. The inefficiency creates an unacceptable burden on JAG resources that are already severely strained in trying to complete the mission.

A lack of efficiency is not the only concern, however. Even when everything works as planned, a soldier routinely waits about a year to get a will action completed. The procedure serves the client poorly, and it also raises professional responsibility issues. Consider the soldier who realizes that a will is needed, and relies on the attorney's promise to meet this need. Unfortunately, 8 months after the interview, and while the will is sitting at headquarters waiting for someone to take it back to the unit, the soldier dies—intestate. Had the unit not offered to do the work, the soldier likely would have consulted a civilian attorney and completed his estate planning objectives before his demise. Even in the absence of actual harm, the lengthy delays may cause anxiety and frustration.

An attorney should not undertake to assist or represent a client without the ability to complete the task properly. The lawyer's "ability" can be analyzed as requiring sufficient resources, including adequate time to do the job right, as well as technical competence. Indeed, Rule 1.3 of the Rules of Professional Conduct for Lawyers (DA Pam 27–26) provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client in every case. . . ." (It is worth noting that this guidance is substantially similar to the ABA's Model Rules of Professional Conduct.) The comments that follow the Rule point out that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. . . . Perhaps no professional shortcoming is more widely resented than procrastination. . . ."

Does an attorney meet this standard under the procedure described here? Another way to state the question is, "What obligation does the lawyer undertake when he or she conducts a will interview with the individual soldier?" Since an attorney-client relationship is formed, is it reasonable to

turn the worksheet in at state headquarters without any follow-up to ensure the will is actually and accurately prepared? Is the lawyer's duty to the client met by relying on "the system" to get the will back to the client for execution perhaps nine months later?

Even if one concludes that the procedure described here comports with a lawyer's minimal professional responsibilities, does it reflect adequate concern for needs of our soldiers and their families? If there is any reasonable alternative method of meeting the need, the answer to the second question almost has to be a resounding "No!" But what alternatives exist?

The best approach provides the JAG team with computers and software that can generate wills while the clients wait. To help meet this need, the Information Management Office at OTJAG will introduce a completely revised and updated LAAWS will program that will be much more thorough and flexible than the current edition.

The other part of the problem, of course, is hardware. Not all JAG reserve detachments and National Guard units possess their own computers, but with careful planning adequate arrangements usually can be made. The unit to be visited may have an IBM-compatible machine that can be pressed into service; this access is not always easy to achieve, but locked doors usually open when the appropriate commander directs that the equipment *will* be made available because the troops deserve and need the support. Another approach involves coordination with the nearest active duty installation. For example, reserve units in Alabama have made arrangements to borrow computers on weekends from a nearby SJA office to prepare wills and powers of attorney for reserve component soldiers. The arrangement works well for both parties: the reserves accomplish their mission, and the active duty attorneys need not worry about a crushing workload to service unprepared reservists in the event of a mobilization.

All this sounds good enough, but what if computers simply are not available? Perhaps procedures could be streamlined to reduce the delays; certainly, the considerations discussed in this note suggest that a maximum effort should be made to achieve this goal. The author of the state study suggested another solution, one which goes against general guidance in the Corps. He proposed that form wills be developed to allow same-day service. Form, or "fill-in-the-blank," wills have caused difficulties in the past because a few courts have refused to admit such documents into probate. The common objection seems to have been that such a will does not demonstrate a sufficient testamentary reflection by the testator before executing the document. Because active duty legal assistance attorneys advise clients from all 50 states and several territories, a general policy against form wills makes sense; after all, it is practically impossible to identify and address the concerns each state might have about such documents in a wide variety of settings.

Reserve component attorneys find themselves in different circumstances. Usually the attorney and all the clients are from one state, and thus it may be easier to determine whether form wills executed by soldiers will be met by judicial skepticism or by acceptance. If the matter is questionable, perhaps guidance could be obtained from an appropriate committee of the state bar. If it seems likely that local courts will admit form wills, it might be appropriate to consider their use, at least until other arrangements can be made for expeditious will processing.

Form wills are not the best answer for reducing delays, and they may not be a feasible answer at all. But the very need to consider them highlights the point of this note. Some of our will preparation practices create thorny professional responsibility issues. The problems are serious enough that solutions, even those that are considerably less than optimal, must be explored. MAJ Guilford.

Consumer Law Notes

Credi(t)-Care, Incorporated

The following note was provided by the Alabama attorney general's office as a public service announcement. The attorney general has indicated that approximately half the complaints received by the consumer protection division regarding Credi-Care, Inc. (incorporated as Credit-Care, Inc. in South Dakota) have been from military personnel.

The Alabama attorney general's office has received numerous complaints over the past eighteen months against a business formerly operating out of Alabama under the name of Credi-Care, Inc. This business operates as a debt adjustment or a debt consolidation company. It charges a fee for providing services that include designing a repayment schedule for its customers that will effectively pay off their creditors over a specified period of time. The company requires that the customers execute a contract and thereafter the company collects payments from the customer and issues drafts to that customer's creditors. From these payments, the company deducts its fee, which according to the contract equals approximately eighteen to twenty-three per cent of the customer's total outstanding debt.

The complaints commonly allege that the company fails to pay creditors in the proper amounts and in a timely manner. The complaints often further state that if they attempt to cancel the contract because they are dissatisfied with the services rendered by Credi-Care, they are charged additional fees by the company specifically because of the cancellation. Many consumers allege that they are left in a worse financial situation after contracting for these services and that their credit ratings are detrimentally affected by Credi-Care's failure to perform in accordance with its representations and the terms of the contract.

The attorney general's consumer protection division has recently learned that this company has relocated to Sioux Falls City, South Dakota, and is operating under the name of Credit-Care Inc., of South Dakota. In spite of the company's incorporation in Alabama and former use of a Birmingham, Alabama, post office box, it maintains its primary office and operation center in Westchester, Illinois. The consumer protection division continues to monitor the activities of this business and to receive and address complaints of consumers who have dealt with the company. Officials in the State of Illinois are also investigating the company's practices to determine if any violation of Illinois law has occurred. A cease and desist order was issued against the company by the Alabama Securities Commission for failure to obtain the proper license before doing business in Alabama. If legal assistance attorneys or their clients have any questions regarding this business and require further information, they may contact the Alabama

Consumer Protection Division at 1-800-392-5658 (toll free) or (205) 261-7334 (commercial).

Consumers Could Protect Against Fraudulent Computer Sales

Clone Component Distributors of America, Inc., which has been advertising the sale of personal computer systems in such publications as P.C. World, PC Magazine, Personal Computing, and Byte, has been placed in receivership by the Texas attorney general for taking consumers' money for computer systems but failing to deliver the computers. Consumers who ordered these systems were allegedly required to pay for them in advance by personal check, cashier's check, money order, or wire transfer and were telephonically informed that their computers would be delivered within a few weeks after their checks cleared. The attorney general's office asserts that when consumers called to inquire about delays they were falsely told that their checks had not yet cleared. Clone has apparently also failed to acknowledge cancellations and to refund consumers' money. The attorney general placed the company in receivership due to concern that the company is insolvent or is in imminent danger of becoming insolvent.

Two New Hampshire companies that sell personal computer equipment worldwide, Scientific Storage Technology, Inc., and Quantus Microsystems, Inc., have allegedly engaged in similarly deceptive practices. The New Hampshire attorney general asserts that these companies have violated the New Hampshire Consumer Protection Act by repeatedly representing to consumers that delivery of their computers could be made in 7 to 10 days, inducing many consumers to prepay in full for the equipment. Consumers have complained that these companies have failed to deliver the equipment within the represented time periods and have refused to refund payments to consumers who had cancelled their orders. Both companies filed bankruptcy petitions in March 1988.

Legal assistance attorneys should remind consumers through preventive law classes, post publications, and other media that prepayment leaves the consumer little leverage in dealing with dilatory merchants and that federal law provides some protection to consumers who pay for goods or services with credit cards. The Federal Fair Credit Billing Act, 15 U.S.C. 1666 (1982) identifies remedial actions available to consumers when billing errors, such as failure to credit an account for undelivered, unaccepted, or returned merchandise, occur. If the consumer has paid for the goods with a credit card such as VISA or Mastercard (this law does not apply where the card issuer controls the merchant involved, such as where a Sears credit card is used to purchase a product from Sears), the consumer can assert all claims and defenses arising out of the transaction against the card issuer, provided: 1) the consumer has first made a good faith effort to resolve the problem with the individual honoring the card, 2) the amount of the initial transaction exceeds $50, 3) the initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address, and 4) the consumer has not yet paid the card issuer the amount in dispute. 15 U.S.C. § 1666i (1982).

Cashing in on Paranoia

Meditrend International, Inc., a San Diego company, has apparently found a way to take advantage of consumers' fears of: AIDS, obesity, cancer, alcoholism, and being too pale to don a bathing suit. The Iowa attorney general has filed suit against the company, which markets its products nationwide, alleging consumer fraud in its sale of "bandage-like" patches which the company claims will help people avoid or cure these maladies when placed on the wrist, on the collarbone, or behind the ear. For example, weight loss patches, thirty of which sell for $29.96, are advertised to help people lose weight by suppressing their appetites. The company also markets tanning patches, anti-smoking patches, anti-alcohol patches, and patches to alleviate PMS and pain. The attorney general's suit asks the court to issue injunctions to prevent future violations of consumer fraud laws, to assess civil penalties, and to award restitution to consumers.

Reaching Out and Touching Can Be Costly

Telephone users may be paying excessive rates for long-distance telephone calls made through "alternative operator services" companies. Alternative operator companies typically contract with private pay telephone owners, hotels, hospitals, airports, and universities to provide long-distance operator services for calls made from these locations. The telephone owner (e.g., the hotel or hospital) receives a commission from each call completed by the alternative operator service. In order to pay the commission, calls made through these companies are billed to the caller at up to 400 percent higher than rates charged by long-distance carriers such as AT&T, MCI, and Sprint.

Callers are often unaware that an alternative company is being used and do not know that they have incurred additional charges for calls until they receive the bill. Even using a credit card, such as AT&T and other phone credit cards, may not protect the consumer from charges for using the alternative company, since these companies may accept the credit card number without identifying the carrier and then charge the alternative rate. Although consumers can often detect these companies by reading the information about long-distance billing policies posted on or near the telephone, absent such materials consumers can avoid these charges only requesting the identity of the operator's company and the rates that will be charged for the call. The Minnesota attorney general has requested that the Public Service Commission regulate these companies in a way that better protects telephone users.

Estate Planning Notes

Antenuptial Agreement May Control Disposition of Estate

A recent decision by a Louisiana court highlights the need to exercise extreme caution when drafting antenuptial agreements for clients. The issue litigated in *Succession of Alfred J. Moran*, 522 So. 2d 1174 (La. Ct. App. 1988), was whether an antenuptial contract may control the disposition of a decedent's estate even though a portion of the agreement was invalid.

In the case, the decedent executed an antenuptial agreement which provided that he was to make a will under which his wife would receive his entire estate, and that he would not revoke or amend his will during his lifetime. The decedent divorced his wife three years after he had signed the agreement and died the following year.

The decedent's will and codicils did not comply with the antenuptial agreement. The decedent's ex-wife filed a petition to assert her claim under the antenuptial agreement against the other parties and creditors claiming shares of the decedent's estate.

The Court of Appeals ruled that the portion of the agreement dealing with the irrevocability of the will was null and void because Louisiana law clearly provides that a testator can never be dispossessed of his right to revoke a will. Nevertheless, the court decided that the decedent's ex-wife could assert her claim because the decedent's promise to leave his ex-wife the disposable portion of his estate did not violate Louisiana law. Since antenuptial agreements are subject to the principal of severability, that portion of the agreement containing this promise could be enforced.

Under the laws of most states, an antenuptial agreement to make a certain provision for a spouse at death is valid and enforceable against the estate. Such an agreement is not a testamentary disposition of property which must meet the strict statutory requirements governing transfers at death. 41 Am. Jur. 2d, *Husband and Wife* 289 (1988).

When conducting will interviews, legal assistance attorneys should ask their clients if they have ever signed antenuptial agreements. As *Succession of Moran* illustrates, the existence of a valid antenuptial agreement may serve as a limit on testamentary freedom to dispose of property entirely as the client wishes. MAJ Ingold.

Real Property Notes

Seller Financing Does Not Satisfy Contingency In Real Estate Contract

If a home buyer is unable to obtain financing from a lending institution, can the seller nevertheless insist on compliance with a land sales contract by offering private financing on terms similar to those available from a commercial lender? According to an Illinois decision, the answer to this question is "no" if the contract calls for financing from a "lending institution." *Gardner v. Padro*, 517 N.E.2d 1131 (Ill. Ct. App. 1987).

In *Gardner*, the buyer's real estate contract was contingent on finding financing within 90 days. After making a good faith effort, the buyer informed the seller that he could not obtain financing. The seller refused to return the buyer's earnest money and instead offered to take back a purchase-money mortgage on the same terms the buyer would have received from a mortgage company.

The buyer rejected this offer and sued the seller for return of his earnest money. The small claims court ruled for the seller-defendant on the grounds that he complied with the contract by offering financing to the plaintiff in keeping with the intent of the parties.

The appellate court rejected this reasoning, finding that the term "lending institution" in the contract was clear and free from any ambiguity. According to the court, the phrase "lending institution" refers to a "commercial enterprise or organization which is engaged in the business of making mortgage loans rather than to a private, individual seller who offers financing to the buyer." *Id.* at 1133.

The financing contingency included in most standard form land sales contracts should be closely reviewed because they are often limited to "lending institutions." Sellers may wish to modify this standard clause to provide that, in the event financing from a commercial lender cannot be obtained, the seller has the option of offering a purchase-money mortgage or alternative financing to satisfy the contingency. MAJ Ingold.

Tax Notes

Deferring Taxable Gain on Sale of Home Limited to Costs Incurred Two Years Prior to Sale

A recent private letter ruling helps explain how deferral of gain under I.R.C. 1034 (West Supp. 1988) works when a couple begin construction on a new home before selling their present residence. Priv. Ltr. Rul. 8,825,021 (Mar. 17, 1988). Usually taxpayers sell one home and then take advantage of section 1034 by purchasing a more expensive new home within the statutory replacement period. I.R.C. 1034. Most taxpayers have a two year period in which to buy a new home, but members on active duty have up to four years to purchase the new home. I.R.C. 1034(h).

According to the letter ruling, if taxpayers take the more unusual approach of buying land and constructing a new home while continuing to occupy their current home, they must complete the project within two years before the sale of the first home to take full advantage of the rollover provisions. There is no special rule extending this two year period before the sale of the home for active duty soldiers.

The facts on which the private letter ruling was issued were relatively straightforward. A couple intended to purchase land and construct a new home over a three-year period. They planned on living in their principal residence during this three year period, and then sell the home for a price that was estimated to be less than the total cost of the land and construction of their new residence.

The IRS ruled that the taxpayer's cost of purchasing the new residence would include only so much of the total construction costs as was incurred during the last two years before the sale of their former home. Treas. Reg. 1.1034–1(d)1)(ii). Since the land on which the new house was to be built was purchased more than two years before the date of the sale of the old home, the land purchase price could not be included in the total cost of the new home for purposes of calculating tax deferral under section 1034. The total basis for the new residence, however, would include all of the costs of acquiring land and constructing the new home less any unrecognized gain from the sale of the first home.

The obvious strategy for taxpayers planning on building a new home before selling their former home is to ensure that all acquisition and construction costs are incurred within the two years preceding the date of the sale of the first home. Although taxpayers failing to comply with this time limitation will still be allowed to add the total costs to the new home's basis, they will not be able to take full advantage of the favorable tax deferral treatment afforded under section 1034. MAJ Ingold.

IRS Rules That Support Payments Are Alimony

A recent private letter ruling has given drafters of separation agreements some room to avoid the recently enacted rule treating certain "lump sum" spousal support payments as nondeductible child support payments. Priv. Ltr. Rul. No. 8820052, Feb 19, 1988. A short review of the law relating to the taxation of support payments is necessary to understand the significance of this letter ruling.

Prior to 1984, lump sum support payments to a former spouse and to child or children could be deducted as alimony even though the payments were actually intended as child support. *Lester v. Commissioner*, 366 U.S. 299 (1961). The 1984 Domestic Relations Tax Reform Act modified this rule by providing that lump sum support payments scheduled to be reduced on a "contingency relating to a child," such as attaining the age of 18, getting married, or obtaining full time employment, must be treated as nondeductible child support to the extent of the reduction. I.R.C. 71(c)(2) (Supp. III 1985).

The new rules further provide that support payments that will be reduced at a time that can be "closely associated" with a contingency relating to a child must also be treated as nondeductible child support. Temporary regulations still in effect identify two situations when it will be presumed that a reduction is closely associated with a child. Treas. Reg. 1.71-1T (Q and A-18). The first presumption exists if a payment reduction occurs within six months before or after a child reaches 18, 21, or the age of majority in the child's state. A second presumption applies when there is more than one child and the support payments are to be reduced two or more times when each child reaches the same specified age between 18 and 24.

The new rules did not leave much room for taxpayers who wanted to take advantage of the alimony deduction and yet have the obligation to provide support reduced when the children no longer lived in the former spouse's home. A solution, according to the recent letter ruling, is to time the reductions at least one-half year before or after the child or children reach 18, 21, or the local age of majority.

In the case before the IRS, the separating couple proposed to amend their divorce decree to provide reductions in spousal support on two specified future dates. The first reduction was to take place just over six months after the couple's first child attained the age of 18 and the second reduction was to take place just over six months after the couple's second child's 21st birthday.

Even though the six-month window under the new law was missed by just one day, the IRS determined that the full amount of payments under the proposed plan would be characterized as alimony for tax purposes. The ruling indicates that the Service will not seek to expand the area of child support payments beyond the parameters contained in the new rules. Thus, as long as lump sum spousal support reductions fall just outside the windows established to define child support, if even by one day, the entire amount of the payment will qualify for favorable alimony tax treatment. MAJ Ingold.

Claims Report

United States Army Claims Service

Tort Claims Note

Processing Life Insurance Applications

Proper processing of soldiers' commercial life insurance applications submitted through U.S. Army personnel channels is essential to avoid liability for payment of the policy amounts by the United States out of appropriated funds. Army regulations permit military processing of an application for commercial life insurance to establish an allotment to pay commercial life insurance company premiums. A Federal Circuit Court recently held that the Army's assumption of this voluntary obligation created a legal duty to carry out the processing correctly.[1] In that case, because the battalion headquarters never received the allotment application from the company clerk, the private insurance company did not receive any premiums prior to the death of the insured. The United States was ordered to pay $118,000, the amount of the policy, to the survivor.

The original judgment against Massachusetts Indemnity and Life Insurance Company (MILICO), the life insurance company, was reversed because although under Louisiana law, the broker who sold the policy to the soldier could be considered an agent of the insurer rather than the insured, he exceeded his authority when he waived the first premium payment necessary to place the policy in effect. The broker wrote on the soldier's copy of the allotment application that the application served as the first premium payment.[2]

The U.S. effort to obtain a dismissal under the *Feres* or "incident to service" doctrine,[3] was not granted. The court held that the doctrine did not apply, as neither the benefits nor military discipline tests are applicable in a suit based on an injury to a soldier's wife.[4] The dismissal of the *Feres* argument was not appealed.

This rationale is difficult to understand, as the suit was not for a personal injury, but for the loss of property. In

[1] Sowell v. United States, 835 F.2d 1133 (5th Cir. 1988).

[2] Sowell v. MILICO, Civil #81-0823A (W.D. La., Aug 9, 1985), reversed and remanded Civil #85-4872 (5th Cir., Aug 21, 1986).

[3] Feres v. United States, 340 U.S. 135 (1950).

[4] Sowell v. MILICO, Civil #81-0823 (W.D. La., Apr 12, 1984).

our view, because the Circuit Court ruled that no insurance contract existed, the beneficiary-spouse had no property rights and no property to lose.

The court also held that the misrepresentation and interference with contract rights exceptions to the FTCA[5] were inapplicable because the basis for the loss arose from the government's negligent loss of the allotment form.[6] The District Court analogized the facts to a 5th Circuit case in which the U.S. destroyed livestock on its mistaken belief the animals were diseased.[7] The analogy is inappropriate, however, as there was no property to destroy in the instant case. Moreover, at least four paydays had passed before the soldier died. The court stated that the decedent was very familiar with the allotment system, yet he took no action in spite of the absence of any notation of an allotment on his leave and earnings statement. Additionally, the life insurance company took no action to enforce payment or to cancel the policy despite the passage of time when no payment was received.

In all of the five decisions in *Sowell*, only the most recent decision of the Circuit Court discussed what tort was committed. It states that Louisiana has extended the voluntary duty concept found in § 323 of the Restatement (Second) of Torts (1965) to provide recovery for damage to chattels, and would apply it under the facts of this case.[8] Precisely which Louisiana tort the court has in mind is not at all clear. The tort of negligent records keeping *could* be applicable if Louisiana has such a tort.[9]

While cases similar to *Sowell* may be more defensible with an earlier and more complete investigation, Staff Judge Advocates and members of their office should emphasize to commanders at all levels the importance of proper, expeditious and complete processing of insurance applications. Mr. Rouse.

Personnel Claims Notes

Rounding-Off Sums

On August 10, 1987, the Army began rounding-off the amounts allowed on personnel claims on each line item, in order to speed up claims processing. Paragraph 11–13g, AR 27–20 (10 July 1987). A few individuals have expressed concern that some claimants are receiving more than they claimed.

The basis for this practice lies in the nature of the Personnel Claims Act, 31 U.S.C. 3721, [hereinafter "the Act"] as a gratuitous payment statute. The intent of the Act is to provide a benefit, partially compensating soldiers for the loss of personal property incident to service, in order to maintain morale and prevent financial hardship. Unlike the statutes that provide for the payment of tort claims, compensation under the Act is not predicated on liability on the part of the United States.

Because of this fundamental difference between the Act and the various tort claims statutes, many practices that would be inappropriate for claims cognizable under the various tort claims statutes have been adopted for administrative convenience in adjudicating personnel claims. For example, there is no requirement that a personnel claim be presented for a sum certain, or that the claimant sign a settlement agreement. Rounding-off is yet another of these procedures, accepted to further the overall purpose of the Act. The fact that a small number of claimants may receive more than they "claim" simply is not a cause for concern.

The Personnel Claims computer program will accept entry of an amount paid that exceeds the amount claimed by up to fifty cents. In addition, claims personnel may encourage claimants to round off sums to the nearest dollar, particularly on the DD Form 1842. Mr. Frezza.

Battery Acid Damage to Uniforms

From time to time, field claims offices raise concern over the policy enunciated in Personnel Claims Bulletin 16, that claims under Chapter 11, AR 27–20 for damage to uniforms due to battery acid spills or other job related incidents cannot be approved. U.S. Army Claims Service has recently conducted a complete review of the policy and determined that it is sound. Commanders who have soldiers working in situations where damage to uniforms is likely can help their soldiers by providing protective clothing or DX items for wear during such activities. Each enlisted soldier receives an annual uniform allowance of $187.20 to cover the cost of replacing damaged or worn uniform items. An analysis of the allowance vis-a-vis clothing store prices shows that it provides ample compensation for uniform losses due to duty requirements. The Army has decided to budget for this allowance and not for replacement in kind to cover uniform needs of soldiers; thus, it is not fiscally sound (nor necessary) to use claims funds to supplement the allowance, and such action would be contrary to Army budget decisions. COL Lane.

Management Note

Reviewing Claim Category Codes

One of the most important data elements in the new, computerized claim record is the category code. Unfortunately, in many offices the person in the office with the least experience is responsible for entering these codes, and the codes are not being checked for accuracy by the claims officers.

The CLAIMS software uses category codes to gauge the incidence of various types of claims and track obligation data. Although the CLAIMS software includes an elaborate error-checking program to detect entries that cannot be valid, the software cannot determine whether an otherwise

[5] 28 U.S.C. 2680(h).

[6] Note 1 *supra*. *See also* Sowell v. MILICO, Civil #81–0823 (W.D. La., May 12, 1987).

[7] Ware v. United States, 626 F.2d 1278 (5th Cir. 1980).

[8] *See* note 1 *supra*.

[9] For a discussion of FTCA liability for negligent records keeping, see Quinones v. United States, 492 F.2d 269 (3d Cir. 1974), INA Aviation v. United States, 468 F. Supp. 695 (E.D.N.Y. 1979); Dee v. United States, 520 F. Supp. 1200 (S.D.N.Y. 1981), Moessmer v. United States, 579 F. Supp. 1030 (E.D. Mo. 1984).

valid category code has been used incorrectly. For this reason, it is essential that each claims judge advocate or office manager review the selection of each claim record category code.

One of the major defects that plagued the DA 3 system was careless coding and the inconsistencies among offices in categorizing claims. The design of the new tort and personnel claims record, and in particular the design and selection of valid category codes, was carefully considered by USARCS. Adherence to guidance previously provided to the field will result in selection of the proper category code. Careful attention to this matter by claims officers will make a significant contribution to the integrity of the Army Claims database. Questions concerning which code to use on an unusual claim should be directed to the tort or personnel claims subject matter experts at USARCS, or to the appropriate overseas command claims service.

When the USARCS has finished installing and testing the new computer programs on its minicomputer, the Army will be in a position to accurately determine what kind of claims it pays and to formulate rational policy based on this information. The effectiveness of this process will depend in large part on the accuracy of the data each claims office provides. Mr. Frezza.

Criminal Law Notes

Criminal Law Division, OTJAG

"Informed Consent" in Criminal Law

Part of the job of the Opinions Team, Criminal Law Division, OTJAG, is to respond to inquiries and letters to the White House, Congress, or the Department of Defense concerning criminal law matters in the Army. The letters, which are often written by an accused soldier or his close relatives, usually allege a miscarriage of justice in a court-martial. The letters can be humorous, such as the mother who was concerned that her son might be sentenced to "five years confinement at Fort Lauderdale" (we should all be so lucky!). On the other hand, the letters can be pathetic, such as the letter from the parents of a murder victim describing the effect of the offense on their family and urging that the accused not be granted parole. More often, though, the letters allege some defect in the court-martial. These letters are frequently the result of uninformed, or inadequately informed, clients. The purpose of this short note is to point out to trial defense counsel some areas where clients can be better informed.

In the medical profession, physicians are required to provide a certain amount of information to ensure the decisions made by the patient are informed decisions. This policy is called the informed consent rule. Rule 1.2(a), Department of the Army Pamphlet 27-26,[1] states that the lawyer must abide by the client's decision concerning choice of counsel, plea, selection of forum, whether to enter into a pretrial agreement, and whether the client will testify. These decisions are made after the client consults with the lawyer. Paragraph 13-4*a* of AR 27-10[2] requires trial defense counsel to explain to the accused his appellate rights. These two sources, DA Pam 27-26 and AR 27-10, represent the minimum amount of information a lawyer must provide to his client. Of course, any defense counsel who zealously represents his client (*See* Comment to Rule 1.3, DA Pam 27-26), will provide more information to his clients than the minimum. In the same way that physicians ensure patients make informed decisions, trial defense counsel should provide as much information to clients so that their decisions are informed.

One recurring complaint of convicted soldiers results from unrealistic expectations that are often created by defense motions or objections during trial. When the military judge rules against a defense motion or objection, the accused gets the impression that the military judge is unfair or biased, even where the motion or objection had little chance of success. The problem can be avoided if the defense counsel explains to the accused the motion and the military judge's ruling. The explanation of motions should be done before trial and should include an assessment of the probability of success of the motion, especially where the motion has little chance of succeeding. If the defense counsel utilizes the "mud-throwing approach" to motion practice (that is "if you throw enough mud, some of it will stick"), then the counsel should tell his client that some of the motions have little chance of success. A related category of complaints is where the defense counsel, within hearing of his client, characterizes an adverse court ruling or decision as wrong or contrary to the law. Such comments do little to foster confidence in the judicial system and result in cynicism toward military justice. When the client hears his sole source of legal authority, his defense counsel, describe a defect in the system, the client will readily adopt that view.

Another common allegation by convicted soldiers is that their defense counsel failed to have certain witnesses testify. This complaint arises when the accused provides his defense counsel with the names of possible witnesses who later turn out to be immaterial, or worse, contrary to the defense. The client gave his attorney the names of witnesses the client fervently believes may help him. If the counsel does not have the witnesses testify, the client, who is unaware that the witnesses cannot help his case and may believe his counsel failed to interview the witnesses, alleges ineffective assistance of counsel. The point to be learned from this situation is that the defense counsel should keep his client apprised of all developments in the case, both positive and negative developments. Although it may be difficult for a defense counsel to inform a client that his best

[1] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987).

[2] Army Reg. 27-10, Legal Services—Military Justice (1 July 1984).

buddy from the unit thinks the accused has no rehabilitative potential and should spend some time in Leavenworth, the client should be told this.

While defense counsel should keep their clients informed of the developments in the case, they should not voice their personal doubts about their own handling of the case. For example, in one letter, a convicted soldier complained that his defense counsel did not try to obtain a pretrial agreement. The soldier's complaint was based on his defense counsel's post-trial lamentation that, "We should have gotten a pretrial agreement." In other words, although you, as a defense counsel, may have shot yourself in the foot during trial, do not give your client the ammunition to shoot you in the back after the trial. This does not mean a defense counsel should hide the weaknesses in the case. On the contrary, the client should be told the strengths as well as all the weaknesses, plus the potential adverse consequences of the weaknesses.

Another aspect of trial defense representation is keeping the client informed of the effect of his court-martial conviction. I often receive letters from soldiers who complain about the onerous effect of their conviction and punitive discharge. For a description of the types of punitive discharges, defense counsel should consult Rule for Courts-Martial 1003(b)(10)[3] and paragraph 2–37, DA Pam 27–9.[4]

In a recent opinion, *United States v. Berumen*, the Army Court of Military Review held that defense counsel, absent a specific inquiry by an accused, are normally not required to provide information to an accused concerning collateral consequences of a court-martial conviction.[5] In *Berumen*, the defense counsel was found not to have rendered ineffective assistance when he failed to advise his client on the immigration and naturalization consequences of a conviction. This holding, however, should not be construed as a license to defense counsel to ignore the collateral consequences of their client's court-martial conviction. Military defense counsel should provide their clients with information concerning the collateral effects of their conviction. An informative article entitled "The Collateral Consequences of a Felony Conviction: A National Study of State Statutes" describes the effect of a Federal conviction on state rights and privileges, such as voting, divorce, and holding public office.[6]

Many of a convicted soldier's questions, and allegations against his counsel, could be foreclosed if the defense counsel maintained some contact with the accused after the convening authority has taken action on the case. Trial defense counsel often take the position that once a client has departed to serve confinement, the counsel need no longer be concerned about the client. If the convicted soldier has to serve confinement at the U.S. Army Correctional Activity or at the U.S. Disciplinary Barracks, the trial defense counsel should write the soldier and merely inquire into his well-being. One short letter to a newly arrived, disconsolate, and angry inmate can prevent hours of accusations and recriminations later on. Captain Brendan F. Flanagan

Authority of Battalion Commanders to Convene Summary Courts-Martial

By what authority are battalion commanders able to convene summary courts-martial? This is an inquiry that is often posed to Criminal Law Division due to the wording of articles 23 and 24, UCMJ. Pursuant to article 23(a)(3), UCMJ, *detached* battalion commanders are authorized to convene special courts-martial. Moreover, pursuant to article 24(a)(1), UCMJ, commanders who are general or special court-martial convening authorities may convene summary courts-martial. The question then becomes: Is the typical battalion found in the Army division a *detached* battalion?

R.C.M. 504(b)(2)(A) indicates that for purposes of articles 23 and 24, a unit is "detached" when the unit is "isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline." The Rule specifically indicates that "detached" is used in a disciplinary, not in a tactical or physical sense. Both the 1951 and 1969 editions of the Manual for Courts-Martial included the following example in paragraph 5b:

> For instance, the commanding officer of a field artillery battalion which is part of an Army division, if responsible directly to the division commander for the discipline of the battalion, may appoint (convene) special courts-martial even though there is a division artillery commander who controls the battalion in other matters.

The long standing position of Criminal Law Division, OTJAG has been that in an Army division, the battalion commander, not the brigade commander to which battalions are attached, is the individual to whom superior commanders look as being primarily responsible for discipline within the battalion. As such, by virtue of article 23(a)(3), the battalion commander is a special court-martial convening authority, which further makes him or her a summary court-martial convening authority pursuant to article 24(a)(1). R.C.M. 504(b)(2)(B) indicates that if a commander is in doubt whether the unit is "detached," the general court-martial convening authority determines whether the unit is "detached" for purposes of articles 23 and 24. Notwithstanding the authority of the battalion commander under articles 23 and 24, UCMJ, superior competent authority may limit the power of the battalion commander to convene special or summary courts-martial. MAJ Holland.

---

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(b)(10).

[4] Dep't of Army, Pam. 27–9, Military Judges' Benchbook (1 May 1982).

[5] *United States v. Berumen*, 24 M.J. 737 (A.C.M.R. 1987), *pet. denied* 26 M.J. 67 (C.M.A. 1988).

[6] Burton, Cullen, and Travis, *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 3 Federal Probation 52 (Sept. 1987). Copies can be obtained from TCAP or TDS.

Administrative Law Note

Administrative Law Division, OTJAG

Reliefs for Cause

This is a reminder to all attorneys who provide advice concerning relief for cause procedures. Paragraph 2–15, AR 600–20 (30 March 1988) contains the basic policy on relief for cause: "If a relief for cause action is contemplated on the basis of an informal investigation under AR 15–6, the referral and comment procedures of that regulation must be followed *prior to the act of initiating or directing the relief*" (emphasis added) (*see also*, paragraph 1–8c, AR 15–6 (11 May 1988) and paragraph 5–18a.1, AR 623–105 (1 February 1988)). Unfortunately, this proviso is frequently disregarded, and many otherwise meritorious relief actions have been nullified following article 138 complaints or IG investigations because commanders did not refer the results of investigations to the officers concerned and, consequently, failed to consider the officers' rebuttals prior to directing relief. Once an officer has been improperly relieved, later referral does not ratify or legitimize the improper relief. To avoid such a result, attorneys should ensure that commanders and supervisors comply with the requirements of AR 15–6 and AR 600–20 prior to relieving subordinates. Should the commander or supervisor deem immediate removal from duties necessary under the facts of the investigation, temporary suspension from duties pending completion of the procedural safeguards of AR 15–6 is permitted under paragraph 2–15*b*, AR 600–20.

Standards of Conduct Note

United States Army Community and Family Support Center

Filing of DD Form 1787

Ethics counselors should be aware of a change to the filing location for DD Form 1787, Report of DOD and Defense Related Employment. In accordance with Army Regulation 600–50, Standards of Conduct for Department of the Army Personnel, paragraph 5–8c(2), current officers and employees required to file DD Form 1787 should file it with the Ethics Counselor of their present duty station; former officers and employees required to file do so with the Ethics Counselor for their last duty station. Prior to the regulatory change, all DD Form 1787's were filed with HQ, US Army Community and Family Support Center. DD Form 1787's incorrectly filed with that agency will be forwarded to the appropriate Staff Judge Advocate Office. Ethics counselors should advise affected departing and retiring officers and employees of the proper filing location for their reports.

Litigation Update

Litigation Division, OTJAG

The following is a narrative summary of recent developments in significant cases involving the Army, Army personnel or other Army interests.

Civilian Personnel

Civilian Drug Abuse Testing Program

On 4 May, the Court of Appeals for the District of Columbia set oral argument in *NFFE v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), and *AFGE v. Carlucci*, 1988 WL 70134 (D.D.C., July 6, 1988), for 18 October. The appeals will be heard in conjunction with the plaintiff's appeal from *AFGE v. Dole*, 670 F. Supp. 445 (D.D.C. 1987). In these three consolidated appeals, the Army seeks to overturn the preliminary and permanent nationwide injunctions of random testing. The injunctions have been stayed and testing may continue pending resolution of the appeal.

On 6 June, the Supreme Court announced that it would hear the Government's appeal in *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988) *cert. granted*, 56 U.S.L.W. 3831 (1988), in which the Court of Appeals for the Ninth Circuit invalidated federal railroading regulations mandating post-accident drug testing. The case will be heard this fall in conjunction with *NTEU v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *stay denied*, 107 S. Ct. 2479 (1987), *cert. granted*, 108 S. Ct. 1072 (1988), a

union's challenge to the Customs Service's testing program which was upheld by the Court of Appeals for the Fifth Circuit. It is believed that a decision in these two cases will provide definitive guidance regarding the constitutional limits of federal civilian testing programs.

Sanctions for Frivolous Discrimination Suits

In *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987), a federal district judge assessed two plaintiffs and their attorneys nearly $84,000 in sanctions for filing "frivolous" race discrimination lawsuits against the Army. In post-judgment hearings concluded on 1 April, the judge indicated that he would assess an additional $27,000 in sanctions against one of the plaintiffs and her attorneys. On 1 June, the Court of Appeals for the Fourth Circuit dismissed several appeals which had been filed by the sanctioned plaintiffs and attorneys. The court found, as we had argued, that the appeals were premature as the district court had not issued a final order regarding the allocation of sanctions among the plaintiffs and their attorneys.

Civilian Acquired Immune Deficiency Syndrome (AIDS) Litigation

In *Plowman v. Department of the Army*, No. C–87–1827–SAW (N.D. Cal. filed Apr. 17, 1987), a former civilian employee alleges his constitutional and statutory rights were violated when he was tested for AIDS without his consent, the results were improperly disclosed and he was forced to resign. Plaintiff has dismissed suit against all individual defendants, save one, based on the lack of personal jurisdiction. Both sides filed supplemental briefs on 9 May on the issues of venue and personal jurisdiction over the remaining individual defendant; we are now waiting for the court to either schedule oral argument or decide the matter based on our written submissions.

In the meantime, plaintiff has initiated the administrative Equal Employment Opportunity process in an attempt to perfect his claim that his resignation from federal service was coerced and in violation of the Rehabilitation Act because of his handicap (positive HTLV III test result). A decision should be made shortly as to whether his administrative claim will be accepted or rejected as untimely.

Contracting Out

Recently, two suits challenging commercial activity reviews at Fort Sill have been filed. In the first suit, *NFFE v. Carlucci*, No. 88–0834 (D.D.C. filed Mar. 29, 1988), the union alleges that the cost comparison conducted regarding Directorate of Logistics operations was unfair and resulted in an erroneous decision to contract out. On 14 June, we filed a motion to dismiss the *NFFE* suit. The second suit, *Teamsters, Local 886 v. Carlucci*, No. 88–773–W (W.D. Okla. filed May 6, 1988), involves an ongoing commercial activity study of Directorate of Engineering and Housing (DEH) functions. Since there has been no decision to contract out the DEH functions, it is believed that *Teamsters* is merely a response to *NFFE*. The Teamsters and NFFE have been involved in a long and bitter representation campaign at Fort Sill. We anticipate filing a motion to dismiss *Teamsters* in the near future.

General Litigation

Freedom of Information Act

The district court in D.C. ruled against us in *Army Times Publishing Co. v. Department of the Army*, No. 87–2866 (D.D.C. filed May 2, 1988). Army Times challenged our denial of a Freedom of Information Act request for a magnetic tape listing the name, pay grade, and installation (including state and zip code) of all active duty Army personnel stationed in the 50 states, D.C., and our territories and possessions. The court order does not require release of information concerning personnel assigned to "sensitive or routinely deployable units." The court held that the tape is not information "related solely to the internal personnel rules and practices of the agency" deserving protection under Exemption 2 of the FOIA. It also found that release of the information is in the "public interest."

Military Personnel

Enlistment Criteria

Lewis v. United States Army, No. 87–2721 (E.D. Pa. filed May 8, 1987), is a challenge by a female GED certificate holder denied enlistment in the Army because she was not a high school diploma graduate. Plaintiff alleges that the Army and Army National Guard enlistment criteria, which require female applicants to possess high school diplomas while allowing men to enlist with GED certificates, deny her due process and equal protection of the laws. We moved for judgment on the pleadings on the basis that the differing enlistment criteria are reasonable. The Court has stayed trial pending its consideration of our motion.

National Guard Training Outside of the United States

In *Perpich v. Department of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *appeal docketed*, No. 87–5345–MN (8th Cir. Aug. 7, 1987), the Governor of Minnesota seeks a declaratory judgment that the Montgomery Amendment is unconstitutional. On 3 August 1987, the district court granted our motion to dismiss the case. The Governor appealed to the U.S. Court of Appeals for the Eighth Circuit. Appellate argument was heard on 9 February. On 7 April, the Court requested copies of all pleadings filed in *Dukakis*.

In *Dukakis v. Department of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *appeal docketed*, No. 88–1510 (1st Cir. May 9, 1988), the Governor of Massachusetts repeated the *Perpich* complaint. On 6 May, the Court granted judgment for defendent's holding that the "Montgomery Amendment is a valid exercise of Congress' power under the Armies Clause and does not violate the Militia Clause." Governor Dukakis has filed his notice of appeal. The court has not yet set the briefing schedule.

Homosexuals

On 8 June, the U.S. Court of Appeals for the Ninth Circuit granted our petition for a rehearing *en banc* in *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir.), *rehearing en banc granted*, 847 F.2d 1362 (9th Cir. 1988). This effectively vacates the 10 February decision of a three judge panel which ruled that homosexuals are a suspect class and that the Armed Services do not have a compelling interest in barring them from reenlistment. The Chief Judge and ten other judges will now decide the case. Plaintiff Watkins is a

former staff sergeant who was denied reenlistment on the basis of homosexuality. Throughout his fifteen-year military career, he admitted that he had engaged in homosexual acts with other soldiers. There is no present impact on our homosexual exclusion policy.

Ben-Shalom v. John O. Marsh, Jr. et al., No. 88–C–468 (E.D. Wis. filed May 3 1988), is a challenge filed on 3 May by Sergeant Miriam Ben-Shalom to her 7 April bar to reenlistment as a member of the U.S. Army Reserve (USAR) which was imposed because of her admission that she is a lesbian. She claims that the bar violates her first and fifth amendment constitutional rights. Ben-Shalom had been reinstated in the USAR pursuant to court order on 1 September 1987.

In *Gay Veterans Ass'n v. Secretary of Defense*, No. 87–5349, slip op. (D.C. Cir. June 29, 1988), plaintiff's appeal was denied by the U.S. Court of Appeals for the District of Columbia Circuit. Plaintiffs appealed the districts court's decision granting our motion for summary judgment on their claim that Service Secretaries cannot authorize the issuance of less than honorable discharges for homosexual conduct.

In *Pruitt v. Weinberger*, 659 F. Supp. 625 (C.D. Cal.), *appeal docketed*, No. 87–5914 (9th Cir. May 5, 1987), our brief was filed on 2 May in reply to plaintiff's appeal of the dismissal of her first amendment challenge to her discharge from the USAR for homosexuality. Plaintiff is an avowed lesbian, and is the pastor of a church for homosexuals. Plaintiff's homsexuality first came to the attention of her military superiors in a published newspaper interview.

Identification of Remains from Southeast Asia

In *Hart v. United States*, No. 86–0487 (N.D. Fla. Filed Oct. 30, 1986), the family of Air Force Lieutenant Colonel Thomas Hart sues for intentional infliction of emotional distress, alleging that the Secretary of the Air Force falsely identified human remains as those of Lieutenant Colonel Hart. The district court granted plaintiffs' motion for partial summary judgment on 11 January. Our motion for reconsideration was denied on 3 March. Trial has been set for 25 July. Plaintiffs' request for an advisory jury has been denied.

Mandatory Retention of Reservists on Active Duty

On 29 June, the Claims Court heard oral argument in *Wilson v. United States*, No. 484–87C (Cl. Ct. filed Aug. 13, 1987), to decide whether the "sanctuary legislation," amending 10 U.S.C. § 1163(d), has retroactive application. If the Army's position is upheld, the legislation will preclude causes of action brought under *Ulmet v. United States*, 822 F.2d 1079 (Fed. Cir. 1987), and should require dismissal of five similarly based law suits.

Posse Comitatus

Haig v. Bissonette, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 108 S. Ct. 1253 (1988) *(per curiam)*, *reh'g dismissed*, 108 S. Ct. 1760 (1988), is a suit challenging the military involvement in the federal response to the 1973 takeover of Wounded Knee, South Dakota, by members of the American Indian Movement. Plaintiff alleges the military was used in contravention of the Posse Comitatus Act, and in violation of plaintiffs' fourth amendment rights. The case was dismissed by the district court, but reversed on appeal. After granting our petition for certiorari the Supreme Court was unable to form a quorum to hear the case because three justices had recused themselves from the case and a minimum of six justices is required. In such cases, the Court is required to enter an order affirming the lower court. On 21 March, the Court issued that order remanding the case for trial. We are preparing to move for dismissal on remaining defenses.

Torts

Tort Liability of Federal Employees

In *Westfall v. Erwin*, 108 S. Ct 580 (1988), the Supreme Court held that federal employees sued in their personal capacities are not entitled to immunity for common law torts unless the actions giving rise to suit were both within the scope of their employment and involved an exercise of governmental discretion. Prior to that decision, the great weight of authority had been that federal employees were absolutely immune from state common law tort liability for their official actions. In an effort to restore protection to federal workers, legislation known as the "Federal Employees Liability Reform and Tort Compensation Act of 1988" has been proposed which would substitute the United States as the sole defendant in cases brought against federal employees for common law torts committed within the scope of their employment. The legislation has passed the House of Representatives.

Environmental Litigation

Rocky Mountain Arsenal (RMA) Litigation

In *United States v. Shell Oil Company*, No. 83–2379 (D. Colo. filed Dec. 9, 1983), the Army brought suit to recover CERCLA response costs and natural resource damages incurred at RMA. On 7 June, the parties lodged with the court a modified proposed consent decree which changed some provisions of the initial consent decree filed 1 February after reviewing the comments received from the State of Colorado and the public. The modified consent decree would settle all litigation matters between the Federal Government and Shell related to the Arsenal. The State filed a brief in opposition to the modified decree on 23 June.

In *Colorado v. United States*, No. 83–2386 (D. Colo. filed Dec. 9, 1983) (consolidated with *U.S. v. Shell, supra*), the State seeks to recover response costs and natural resources damages from the United States and Shell Oil Company. In *Colorado v. Department of the Army*, No. 86–C–2524 (D. Colo. filed Nov. 14, 1986), the State seeks to enforce its hazardous waste laws on RMA regarding the cleanup activities. Neither of these cases is affected by the proposed consent decree and discovery continues in both. In the latter case, Colorado is continuing in its attempt to obtain jurisdiction over cleanup activities at Basin F, a former disposal site on the Arsenal. Colorado's motion for a preliminary injunction requiring compliance with the State's cleanup schedule, heard by the court on 11 December 1987, has not been ruled upon. The United States and Shell moved on 2 March to consolidate all three cases regarding RMA. This motion is also still pending.

Twin Cities Army Ammunition Plant (TCAAP) Litigation

In *New Brighton v. United States*, No. 4–84–720 (D. Minn. filed Jul. 13, 1984), and *St. Anthony v. United States*, No. 4–86–169 (D. Minn. filed Mar. 5, 1986), two municipalities in the vicinity of TCAAP seek CERCLA response costs and damages related to contamination of city water wells alleged to have been caused by the Army. New Brighton has recently accepted an Army settlement offer that will provide the city with $8,052,370 primarily for the purpose of reimbursing the city for funds expended for alternate water sources. DOJ approval is expected shortly and a settlement agreement will then be executed. Litigation continues with St. Anthony where substantial questions exist regarding the Army's liability for the contamination. In *Werlein v. United States*, No. 3–84–996 (D. Minn. filed Jul. 13, 1984), plaintiff seeks injunctive relief and damages for groundwater contamination. On 24 January 1987, the Court denied the plaintiff's motion to certify a class of approximately 30,000 people who reside in the vicinity of TCAAP.

NEPA Litigation

Axlerod v. Reagan, No. 87–2408 (D.D.C. filed Sep. 1 1987), was filed by plaintiff on 1 September 1987 for declaratory and injunctive relief regarding DOD activities related to the development, production, assembly, handling, storage, deployment and transportation of both nuclear and conventional weapons and delivery systems which may be adversely affected by electromagnetic radiation. Plaintiff alleges that DOD and the services have failed to do either environmental impact statements or assessments as required by NEPA. Plaintiff contends that electromagnetic radiation, including lightning, electrostatic discharge and electromagnetic pulse simulators are capable of accidentally firing, dudding or launching ordnance. The government filed a motion to dismiss for lack of standing. Plaintiff filed its response in opposition on 29 April. A ruling on the motion is expected shortly.

Foundation on Economic Trends v. Weinberger, No. 86–2436 (D.D.C. filed Sep. 2, 1986), sought to enjoin DOD's use of electromagnetic pulse (EMP) simulators. The simulators are located at seven DOD sites, four of which are operated by the Army (White Sands Missile Range, Redstone Arsenal, Woodbridge Research Facility in Virginia, and CERL in Champaign, Illinois). Plaintiff seeks an injunction alleging that DOD and the services have failed to do either environmental impact statements or assessments as required by NEPA. On 18 April, the Assistant Secretary of the Army for Research, Development and Acquisition, ordered all Army EMP simulator sites to cease pulsing until the appropriate NEPA documents were completed. On 13 May, the case was settled with the suspension order incorporated into the settlement agreement.

Environmental Crimes

On 28 June, a federal grand jury in Baltimore returned a five-count indictment against three employees of the U.S. Army Chemical Research, Development and Engineering Center (USACRDEC), Aberdeen Proving Ground, Maryland. The indictment alleges four violations of the hazardous waste provisions of the Resource Conservation and Recovery Act and one violation of the Clean Water Act apparently arising out of the performance of official duties. In addition to announcing this indictment, the U.S. Attorney's Office stated that the investigation is continuing. The indictment raises major issues concerning the enforcement of environmental statutes against federal officials.

International Law Note

International Affairs Division, OTJAG

The Subject Matter Expert Exchange Program in the Field of Military Law

On 20 June 1988, MG Hugh R. Overholt, The Judge Advocate General, signed a Letter of Instruction creating a Subject Matter Expert Exchange Program in the field of Military Law. The Deputy Chief of Staff for Operations and Plans authorized the Subject Matter Exchange Program (SMEE), which will be paid for by The Latin American Cooperation Fund. The purpose of the program is to encourage awareness and cooperation between the United States Army and armies of Latin America. There have been Subject Matter Expert Exchange Programs in other areas, but his is the first time a SMEE has been established in the area of military law.

The objective of the SMEE in the field of military law is "to enhance army-to-army contacts, promote understanding of mutual interests, and foster cooperation among armies of the American states in the areas of military law and legal issues affecting military programs and operations." The program was originated after discussions between the International Affairs Division of the Office of The Judge Advocate General and the Political Military Division of the Office of the Deputy Chief of Staff for Operations and Plans (DAMO–SSM), which is the Army proponent for the Latin American Cooperation Fund. General Overholt tasked the International Affairs Division to develop an operating procedure for the SMEE, schedule the SMEE sessions, and develop their content and subject matter.

The International Affairs Division has completed the SOP, and is now planning the implementation of the SMEE. Judge advocate teams will visit Latin American countries to discuss military law matters with their Latin American counterparts. These discussions will include such

topics as the law of war, joint operations, counter- and antiterrorism, counter-drug activities, and military justice. Two person teams will participate in each SMEE, and at least one member of the team will be fluent in Spanish or Portuguese. The other member of the team will have some familiarity with the language, but subject matter expertise will be the dominant qualification for choosing that member.

Although the International Affairs Division will be responsible for the program, not all of the participating attorneys will be from the Division. After the first several sessions, we will look to other divisions at OTJAG, The Judge Advocate General's School, and judge advocate offices in the field to provide officers who have subject matter expertise and the requisite language abilities.

Each session will consist of a one or a two day visit with representatives of a Latin American country. We plan to hold the first session this fall at the School of the Americas, which is located at Fort Benning, Georgia. Thereafter, the attorneys participating in the program will visit various Latin American countries either singly or in groups. For example, we plan to visit Mexico, the Caribbean Region, the Andean Region of South America, and the Southern Cone (the southern part of South America). Some SMEE sessions will also be held in the United States. DAMO–SSM, in coordination with the Southern Command in Panama, will arrange for the visits. We plan to begin with a discussion of the nature and function of the lawyer in the American Army—what we are and what we do as Army judge advocate officers. As a result of this mutual exchange of ideas, we hope to learn about the roles of lawyers in other countries.

Other topics we intend to discuss include the law of war, standards of conduct, and cooperation in military exercises. A law of war training film in Spanish will be shown and used to stimulate discussion. DAMO–SSM has arranged for the translation into Spanish of materials on ethics and standards of conduct, which will be used for discussion on these issues. Finally, we plan to discuss several exercises that the US Army has conducted in the Latin American region, and discuss mutual problems and how our countries can cooperate to solve these problems. These last discussions will be presented within the framework of what we are calling "operational law."

It is apparent that a great deal of work must be done. We must translate more materials into Spanish and Portuguese, prepare more talking papers, and discover the interests of particular countries. We hope that the first session at The School of the Americas will produce ideas and constructive criticism from the Latin American officers attending. Because the Latin Americans will come from a variety of countries, we should obtain a good sampling of what benefits the Latin American countries would like to derive from the SMEE.

It is our hope that the SMEE in the field of military law will provide the Judge Advocate General's Corps with a vehicle to facilitate discussions with Latin American judge advocates. Although there has been some difficulty in setting up exchanges in the past, the SMEE should be a lasting program for the exchange of ideas. We can develop contacts, share mutual concerns, and learn a great deal from each other. This is especially significant in light of the increasing importance of Latin America in US Army planning.

Officers, both active and reserve, who are interested in participating in the SMEE, should contact the International Affairs Division at the Office of The Judge Advocate General. We especially need attorneys who are fluent in Spanish or Portuguese. Thoughts on how to conduct the SMEE, what issues might be discussed, or any other ideas, are welcome. Some officers may have a particular knowledge of the country or area that we intend to visit, and would be very helpful in planning or participating in the discussion.

The SMEE in military law will be valuable both for The Judge Advocate General's Corps and the Army. It will pave the way for greater cooperation between the United States and Latin American armies. The SMEE may resolve problems arising out of US and Latin American military contacts. Finally, it will help US and Latin American judge advocates understand each other and learn by the experiences shared during the SMEE discussions. COL James A. Burger.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Tapping Reserve Manpower Through Training Programs

Colonel Benjamin A. Sims
Director, Guard and Reserve Affairs, TJAGSA (1986–1988)

Lieutenant Colonel William O. Gentry, USAR
Special Assistant to the Commandant for Reserve Affairs

A Desperate Staff Judge Advocate

An active duty staff judge advocate of an overburdened installation was desperate to find additional claims manpower in this era of budget scarcity. The claims section had experienced an extra heavy measure of household goods claims due to the transfer of a large unit to the post. Although authorization for additional staffing was being considered by higher headquarters, the staff judge advocate was concerned about the immediate future. What could be done?

A temporary solution was arranged when it was discovered that The Judge Advocate General's School maintains a database of Reserve component judge advocate officers. The database showed that a number of Individual Mobilization Augmentees resided in the vicinity of the installation. A number of them were more than willing to be attached to the staff judge advocate's section to assist with the claims load in return for the receipt of retirement points.

Many other desperate, as well as less desperate, staff judge advocates have used the database to assist them. This article is designed to teach anyone how to arrange a mutually beneficial agreement to both train the reserve member and to provide the staff judge advocate with additional resources.

Among those items that will be discussed are: (1) essential information about the reserves, (2) how to find reservists to assist you, and (3) how to use reservists properly.

Understanding the Reserves

For our purposes, reservists come in essentially three varieties: (1) unit (TPU), (2) Individual Mobilization Augmentee (IMA), and (3) Individual Ready Reserve (IRR). Although these categories are not all inclusive, they are the three primary types of reservists.

TPU reservists belong to TO&E reserve units, normally attend drill 48 times per year or 12 weekends (4 days pay per weekend or MUTA), and one two week training period. IMA's belong to an active duty TDA at a post or other assignment and attend only a two week training session. IRR's attend nothing unless money is available and they desire to train.

Annual active duty training (AT) for two weeks is required of all reservists in units or in the IMA. The TDA organization to which the IMA is assigned normally schedules AT for the IMA. TPU personnel assigned to unit legal offices attend AT with the unit. For example, 81st Army Reserve Command legal personnel assigned to the unit legal office generally attend AT with that command. Distinguish this example from the situation where personnel are assigned to a Judge Advocate Service Organization (JAGSO).

The JAGSO's have their AT scheduled for them by the Continental US Army staff judge advocate. Every third year, however, the JAGSO's attend special training at The Judge Advocate General's School.

Retirement Points

One motivation for reservists are retirement points. Points are used by the Army to determine the amount of retirement pay for reservists who are eligible to receive a pension. Pensions will not be discussed in detail, but they are important and without a sufficient number of good retirement years, the reservist cannot receive a pension.

Under the reserve retirement system, a reservist can earn retirement by completing 20 creditable (good) years. Upon completing 20 good years, the reservist will be able to start receiving monetary benefits upon reaching age 60.

What is a good retirement year? A good retirement year is not completed by just being alive and in the reserves. To be a creditable year, it must be one in which at least 50 retirement points are earned.

Reservists will normally desire to earn more than the minimum of 50 points because the amount of retirement income they receive will depend on the total number of retirement points they have earned.

Basically, there are two categories of retirement points—active duty points and individual duty training (IDT) points. One point is earned for each day of active duty. Thus, 365 active duty points can be accrued in one year.

IDT points include points for: (1) drills, (2) assigned work and projects for "points only," (3) correspondence courses, and (4) annual membership.

An example of one IMA's annual point record is as follows:

—Membership points automatically awarded for being active 15

—Annual training (one point for each day of active duty) 12

—Correspondence course work (one point for each three credit hours) 15

—IDT "points only" work (including home projects) 10

When "points only" are accrued and no pay is involved, the points accumulate at the rate of one point for the first two hours of legal work in a day. Another point is accumulated for additional work amounting to eight hours in the same day. No more than two points may be earned per day. To illustrate, Captain Arbiter is reviewing a record of trial at home. She works for five hours during one day to review the record. She will receive one point. If she had worked eight hours during the one day, she would have received two points.

The Captain Arbiter example shows how "Rule 16" of Army Regulation 140–185 works. Simply stated, this rule provides that an officer may be awarded one point for two hours of work in a one day period. For the officer to earn a second point in one day, she must work eight hours.

Captains and majors often satisfy their need for points by completing correspondence courses. The JA Advanced Course is required for promotion to major; C&GS is required for promotion to lieutenant colonel and colonel. Lieutenant colonels and colonels rely less on correspondence courses, and more on doing "points only" project work.

The law provides that no more than a combined total of 60 points may be credited for IDT, extension courses, and membership. For example, an individual who has 48 IDT points for drills or other projects, 23 correspondence course points, and 15 membership points, will be awarded only 60 points for that year. An exception is allowed if the individual had been on active duty during the year. Under the exception, the active duty points would be added to the 60 IDT points.

Unit JA's have little difficulty earning the 50 points. Typically, they will earn 75 points through normal unit participation. IMA's will generally be looking for at least 23 points to add to the 15 they have received for membership points and the 12 they received for their annual training. IRR's, if they are concerned at all, may be searching for up to 35 points to add to the 15 membership points they possess.

Although there are exceptions, most IRR's are in that category because they do not desire to participate actively, or circumstances do not allow their involvement. A few are in the IRR in a transition mode to another status. Therefore, only a few may be anxious to receive additional points.

Mutual Support Training

Mutual Support Training (MST) is the term used for the concept of "concerted, working relationships among the elements of the AC, the ARNG, and the USAR." AR 11–22 explains the stated concept and the objectives to be achieved by this program.

From the JA viewpoint, some of the objectives are to: (1) improve the mission capability and mobilization readiness of the reserves; (2) provide means for peacetime training of RC units on legal issues not otherwise available to them; (3) help the AC accomplish its mission by providing RC legal assets in direct mission support of AC units; (4) enhance Total Force readiness through the sharing of experiences, equipment, and facilities; (5) develop a common understanding among all components; and (6) effect comprehensive and dynamic mutual support by fostering imaginative new concepts of association between AC and RC within the resources available and whenever and wherever practicable.

The effectiveness of the MST program can be measured by increased readiness, job satisfaction, and the strengthening of the Total Force. FORSCOM JA Training Circular 27–87–1 recognizes the utility of MST. TJAG supports the concept by providing guidance in a model training plan that was issued on 6 June 1988, and which was published in the July 1988 edition of *The Army Lawyer.*

If the situation lends itself to a MST program, and if you expend the effort to set it up and make it work, it can be of great benefit to you. There is a BIG condition, however, to implementation of a MST. The MST must benefit the Reserves as well as the active component. Generally, this is interpreted to mean that the Reserves must gain some appropriate "hands on" experience relevant to their mobilization missions.

Even if a Reserve officer or detachment has time for MST, they may still not need a full diet of claims work. They may be able to be used for some claims work and training, and the active component can use them accordingly.

MST can be used to supplement the classroom training received by reservists. This allows them to work with "real life" training missions of the active component.

The model plan for MST is oriented primarily toward the involvement of active duty SJA offices and reserve component unit legal office JA's in a MST arrangement. It is recommended that a formal arrangement of MST be reduced to a memorandum of agreement between the active organization and the functional team. The funding for this may be the IDT funding for the scheduled paid drill sessions. Any arrangement for TPU's must be approved by the appropriate CONUSA SJA.

Providing a Promotion Boost

Motivating factors other than points or pay include factors that will improve promotion potential. An ideal situation for an IMA or IRR officer who resides close to an installation, is to have the Army Reserve Personnel Center (ARPERCEN) produce orders attaching the officer to the AC organization.

Attachment of the Reserve officer will generate an annual Officer's Evaluation Report (OER). This can be of great value to the officer at promotion time—especially for the IMA or IRR officer. This OER is in addition to the OER the officer will receive for the two weeks of annual training.

An additional major benefit of the attached status is that the AC will then have the authority to authorize the officer to do "points only" work anytime agreed to by the AC and the officer.

Finding and Funding Reservists

The best chance for finding assistance and developing good MST lies with nearby JAG units such as Judge Advocate Service Organizations (JAGSO's). These teams are

organized into international/claims teams, trial teams, contract teams, judge teams, and administrative law teams.

The first source for finding JAGSO's is the unit's roster, which can be obtained from TJAGSA, JA Guard and Reserve Affairs Department. Units are sorted by state. When a unit is found that looks promising, the senior officer in the team or unit legal section should be contacted to discuss the feasibility of an arrangement.

IMA's are the next best alternative. In addition to IMA's known to the using active duty organization, others can be located by using the IMA rosters that can be obtained from TJAGSA.

IMA's can be used during active duty periods, for "points only" in the office, or for "points only" at home or other locations. Training for "points only" creates no funding concerns.

If the desire is to locate IRR officers, prospects can be found on the state-sorted personnel roster (again obtained from TJAGSA).

Annual training funding has not been a problem until the last several years. Recently, funding for IMA's has been reduced and not all IMA's have been able to be funded for annual training. To avoid this problem, requests for training should be submitted by July or August for the following fiscal year. For example, requests to train in January 1989 should have been submitted in July 1988.

If it is necessary to change a training date after publication of orders, an amendment can be requested and issued, as funds were obligated at the time the original order was issued.

Additional tours beyond the normal tour are sometimes possible depending on the availability of funds. These funds are often like targets of opportunity. They may be unexpected and pop up at any moment. Regular contact with the JA officers at ARPERCEN is the key to using them.

IMA's assigned to an active duty TDA are great sources of "points only" work. The "points only" projects can be designed to correlate with the annual training. If the IMA belongs to another office, they may still be used; we recommend, however, that they be attached to you.

Active duty tours for IRR officers are totally dependent on ARPERCEN funding constraints. At times, ARPERCEN has an abundance of funds to support counterpart tours with the active component. It is necessary to periodically check with the PMO at ARPERCEN about money.

If ARPERCEN has funds, it becomes a matter of simply identifying an IRR officer to take a training tour with the active duty organization.

"Points only" training for the IRR is similar to that performed for the IMA, except that it is more important for the IRR individual to be attached to the active duty organization in order to have someone who can authorize the "points only" work. For an IMA, the IMA agency can do it. For an unattached IRR, advance authorization from ARPERCEN must be obtained.

Using the Right Tools in Capturing Resources

The JA Guard and Reserve Affairs Department, TJAGSA maintains some information tools to assist in finding and arranging reserve units or individual reserve officers to become a resource in accomplishing the Total Force mission.

The following rosters are available:

(1) A roster of reserve units sorted by state. It includes JAGC units (JAGSO's) and non-JAG units with unit legal offices. It contains a list of JA's assigned to the JAG unit or unit legal office with a unit telephone number and a business telephone number for each officer.

(2) State sorted roster of all JA's in the country listing their city and state of residence, and their telephone numbers.

(3) IMA roster sorted by type of position held.

An article, Management of Your IMA's, was published in the June 1987 issue of *The Army Lawyer*. This article was designed to provide information on using IMA's during other than their period of two weeks of annual training.

A copy of the model plan for MST was published in *The Army Lawyer*, July 1988. This plan will assist active component SJA's and JA officers and reserve component JA activities to devise and implement meaningful mutual support training programs. Remember that the plan is advisory and should not be followed when it conflicts with good judgment and common sense.

Development of a Mutual Support Training Plan

As stated in the model, the plan focuses on mission-oriented training that allows the reservist to obtain hands-on experience, and reinforces TJAGSA technical training. Although legal assistance by RC JA's is an appropriate element of a MST program, all areas of military legal practice will be encompassed by a soundly devised MST program.

Once initial planning has occurred and the AC and RC have communicated, the CONUSA SJA will ensure that appropriate match-up will take place between the AC and the proposed RC unit. An agreement will be completed between the parties to the MST that includes: (1) identification of action and liaison officers, (2) plan of operation, (3) support to be provided by each component, and (4) who has responsibility for preparation of a schedule for training plans.

Preparation of training plans is essential. They will be initiated by the AC and will be prepared in concert with the memorandum of agreement. Among other items, the plans should include dates, times, locations, substantive duties, assignments, training to be provided in addition to MST, and the method by which the sessions will be evaluated.

An orientation by the AC for the benefit of the RC is suggested in order to familiarize the RC with the office and requirements. Continuing coordination is necessary to accommodate problems occurring during the term of the agreement.

An often overlooked element of any plan is that of evaluation. The model provides that all MUSARC and AC

SJA's involved in MST will submit annual progress evaluation letters to the CONUSA SJA which details the nature, amount, and quality of the training. The CONUSA SJA will consolidate the evaluations and send them to the FORSCOM SJA with a copy to TJAGSA ATTN: JAGS–GRA.

The Bottom Line

In addition to the reserve components being a resource to the AC, the AC must remember that the AC is the primary resource for the reserves. Failure to recognize this truth will hinder proper use of the reserves. If the arrangement is to work well and long, consistently worthwhile training experiences must be provided. It takes some effort, but the effort will be rewarded by the assistance rendered by the reserves, and just as importantly, by the quality training which the reserves receive.

GRA Notes

Active Guard/Reserve Program

Presently there are opportunities in the Active Guard/Reserve (AGR) Program for reserve component judge advocates to obtain full-time active duty tours. The program is available to those officers desiring only one AGR tour, as well as those desiring to make a career in the program. An AGR officer may accumulate twenty years of active federal service and qualify for active duty retirement.

There are ten AGR judge advocate positions in the Reserves and fifty-four in the National Guard. If you are a Reserve or National Guard judge advocate, or will soon be released from active duty, and would like additional information on the AGR Program, contact Lieutenant Colonel William O. Gentry (Reserve Representative to The Judge Advocate General's School) or Lieutenant Colonel William J. Doll (National Guard Representative to The Judge Advocate General's School), Judge Advocate Guard and Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, VA 22903–1781, telephone (804) 972–6380, or AUTOVON 274–7110, ext. 973–6380.

1989 JAOAC Training Dates

The Judge Advocate Officer Advanced Course (JAOAC), Phase II, is scheduled at TJAGSA from 19–30 June 1989. Inprocessing will take place on Sunday, 18 June 1989. Attendance is limited to those officers who are eligible to enroll in the Advanced Course. Course quotas are available through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground for ARNG personnel and through channels from the JAGC Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN) (800–325–4916) for USAR personnel. Requests for quotas must be received at ARNG OAC or ARPERCEN by 14 April 1989. Court-martial trial or defense team officers who wish to attend JAOAC instead of JATT must obtain a JAOAC quota. No transfers between courses will be permitted after arrival at TJAGSA. Personnel who report to Charlottesville without a quota from ARNG OAC or ARPERCEN will be sent home.

All personnel are reminded that students must comply with Army height/weight and Army Physical Readiness Test (APRT) standards while at TJAGSA. Point of contact at TJAGSA for this course is Major Chiaparas or Mrs. Lee Park, Guard and Reserve Affairs Department, telephone (804) 972–6380 or AUTOVON 274–7110, ext. 972–6380.

1989 JATT Training Dates

Judge Advocate Triennial Training (JATT) for court-martial trial and defense teams and for military judge teams will be conducted at The Judge Advocate General's School Army (TJAGSA) from 19–30 June 1989. Inprocessing will take place on Sunday, 18 June 1989. Attendance is limited to commissioned officers only; alternate AT should be scheduled for warrant officers and enlisted members. The 2072d U.S. Army Reserve Forces School (USARFS), Philadelphia, PA, will host the training; orders will reflect assignment to the 2072d USARFS with duty station at TJAGSA.

JATT is mandatory for all court-martial trial and defense team and military judge team officers. Individuals belonging to these units may be excused only by their CONUSA Staff Judge Advocate with the concurrence of the Director, Guard and Reserve Affairs Department, TJAGSA.

Units should forward a tentative list of members attending AT at TJAGSA to the School, ATTN: JAGS–GRA (Mrs. Park), no later than 14 October 1988. Final lists of attendees must be furnished no later than 17 March 1989. Units are responsible for ensuring attendance of unit personnel. "No-shows" will be reported to respective ARCOM Commanders for appropriate action. Team members who do not appear on the final list of attendees submitted by the unit should not be issued orders. Personnel who report to Charlottesville who have not been previously enrolled in JATT will be sent home.

Commanders are encouraged to visit their units during the training; these visits, however, must be coordinated in advance with either Mrs. Park or Major Chiaparas of the Guard and Reserve Affairs Department at the telephone numbers listed below.

ARNG judge advocates are invited to attend this training and may obtain course quotas through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground. Point of contact at TJAGSA for this course is Major Chiaparas or Mrs. Lee Park, Guard and Reserve Affairs Department, telephone (804) 972–6380 or Autovon 274–7110, ext. 972–6380.

On-Site Canceled

The St. Louis on-site scheduled for 29 and 30 October has been canceled. Officers affected by this change may attend on-site training at alternate locations listed in the July issue of *The Army Lawyer* at 76.

USAR Tenured JAGC Positions

There are 102 tenured JAGC positions in USAR Troop Program Units. These positions include the Military Law Center Commander and the senior Staff Judge Advocate positions in ARCOMs and GOCOMs. The Judge Advocate General's approval is required for assignment to any of these positions (AR 140–10, Section VI).

The procedure for filling these positions requires that the unit take action at least nine months prior to the end of the incumbent's tenure. The first step should be to advertise the impending vacancy in unit bulletins or command newspapers and ensure qualified IRR members in the area know that they may apply for the position. A list of eligible officers can also be obtained by initiating a Request for Unit Vacancy Fill (DA Form 4935–R). The DA Form 4935–R can be sent to the MUSARC, adjacent MUSARCs, and ARPERCEN (ATTN: DARP–MOB–C). The unit should nominate at least three candidates. The nomination packets should contain a list of all officers considered and a description of the efforts to publicize the vacancy. The following information must be submitted for each officer nominated:

a. *Personal data:* Full name (including preferred name if other than first name), grade, date of rank, mandatory release date, age, address, telephone number (business and home), full length official photograph.

b. *Military experience:* Chronological list of Reserve and Active Duty assignments; copies of Officer Evaluation Reports for the past 5 years (including senior rater profile).

c. *Awards and decorations:* Copies of all awards and decorations; significant letters of commendation.

d. *Military and civilian education:* Schools attended, degrees obtained, dates of completion, and any honors awarded.

e. *Civilian experience:* Schools attended, degrees obtained, dates of completion, and any honors awarded.

Nominations will be forwarded through the chain of command to arrive at TJAGSA (ATTN: JAGS–GRA, Charlottesville, VA 22903–1781) at least six months before the tenure expires. Tenure for these positions is three years and officers selected are expected to serve the full three years. No extensions of the tenure period will be granted unless no other qualified officers are available or if there will be an adverse impact on the mission of the unit. Officers in the appropriate grade for the assignment have priority. An 0–5 will not be selected if a qualified 0–6 is available for a position authorized an 0–6. Officers will usually only have one tour in the same tenured position. Continual rotation is not permitted except when no other qualified officers are available.

Senior Reserve Judge Advocate Positions

U.S. Army Reserve Commands

ARCOM		SJA	Vacancy Due
		First Army	
77	Fort Totten, NY	LTC A. J. Benedict	Oct 88
79	Willow Grove, PA	COL J. D. Campbell	Jul 89
94	Hanscom AFB, PA	COL P. L. Cummings	Apr 89
97	Fort Meade, MD	COL C. E. Brookhart	Dec 88
99	Oakdale, PA	COL A. B. Bowden	Sep 90
		Second Army	
81	East Point, GA	COL K. A. Nagle	Apr 90
120	Fort Jackson, SC	COL J. M. Cureton	Sep 89
121	Birmingham, AL		
125	Nashville, TN	COL J. B. Brown	Feb 91
		Fourth Army	
83	Columbus, OH	LTC D. A. Schulze	Sep 90
86	Forest Park, IL	COL M. R. Kos	Feb 91
88	Fort Snelling, MN		
123	Indianapolis, IN	LTC J. F. Gatzke	Feb 89
		Fifth Army	
89	Wichita, KS	LTC D. J. Duffy	Apr 90
90	San Antonio, TX	COL G. M. Brown	Mar 89
102	St. Louis, MO	COL C. W. McElwee	Jul 91
122	Little Rock, AR	COL B. W. Sanders	Feb 89
		Sixth Army	
63	Los Angeles, CA	COL A. C. Fork	Jan 90
96	Fort Douglas, UT	COL C. A. Jones	(Ext) Aug 89
124	Fort Lawton, WA	COL J. L. Woodside	Mar 90

Military Law Centers

MLC		Commander	Vacancy Due
		First Army	
3	Boston, MA	COL P. S. Iuliano	Sep 88
4	Bronx, NY	COL C. E. Padgett	Apr 89
10	Washington, DC	COL R. G. Mahony	Sep 89
42	Pittsburgh, PA	COL J. A. Lynn	(MRD) Aug 89
153	Willow Grove, PA	COL J. S. Ziccardi	Aug 89
		Second Army	
11	Jackson, MS	COL J. F. Wood	Aug 91
12	Columbia, SC	COL O. E. Powell, Jr.	Sep 89
139	Louisville, KY	COL H. L. Keesee	Jun 91
174	Miami, FL	COL D. H. Bludworth	(Ext) Jun 89
213	Chamblee, GA	COL K. A. Griffiths	Feb 90
		Fourth Army	
7	Chicago, IL	COL G. L. Vanderhoof	Feb 91
9	Columbus, OH	COL H. Ernst, Jr.	May 89
214	Ft Snelling, MN	COL J. M. Mahoney	(MRD) Dec 90
		Fifth Army	
1	San Antonio, TX	COL J. M. Compere	Jun 89
2	New Orleans, LA	LTC J. C. Hawkins	Jan 90
8	Independence, MO	COL D. E. Johnson	Nov 90
113	Wichita, KS	COL L. L. Taylor	Mar 89
114	Dallas, TX	COL C. J. Sebesta, Jr.	Mar 90
		Sixth Army	
5	Presidio of SF, CA	COL J. A. Lassart	Jul 91
6	Seattle, WA	COL T. J. Kraft	Aug 89
78	Los Alamitos, CA	COL D. F. McIlroy	May 90
87	Ft Douglas, UT	COL M. J. Pezely	(Ext) Sep 89

Training Divisions

TNG Div		SJA	Vacancy Due
		First Army	
76	West Hartford, CT	MAJ H. R. Cummings	Sep 90

78	Edison, NJ	LTC J. P. Halvorsen	Feb 90
80	Richmond, VA	COL B. Miller III	Oct 88
98	Rochester, NY	LTC J. W. Dorn	May 90
	Second Army		
100	Louisville, KY	LTC L. R. Timmons	Mar 90
108	Charlotte, NC	LTC A. H. Scales	Dec 90
	Fourth Army		
70	Livonia, MI	LTC J. M. Wouczyna	Apr 89
84	Milwaukee, WI	LTC J. H. Olson	Nov 88
85	Chicago, IL	LTC T. J. Benshoof	Aug 90
	Fifth Army		
95	Midwest City, OK	LTC W. H. Sullivan	Aug 89
	Sixth Army		
91	Sausalito, CA	LTC R. A. Falco	Feb 89
104	Vancouver Barracks, WA	LTC D. C. Mitchell	Apr 89

General Officer Commands

GOCOMS	SJA	Vacancy Due
First Army		
8 MED BDE Brooklyn, NY		
157 INF BDE (SEP) Horsham, PA		
187 INF BDE (SEP) Ft. Devens, MA		
220 MP BDE Gaithersburg, MD	MAJ A. J. Moran	(Ext) Apr 89
300 SPT GP (AREA) Ft Lee, VA	LTC F. X. Gindhart	
310 TAACOM Ft Belvoir, VA		
352 CA CMD Riverdale, MD	LTC R. M. Smith	Apr 91
353 CA CMD Bronx, NY	LTC R. R. Baldwin	Apr 90
359 SIG CMD Liverpool, NY		
411 ENGR BDE Brooklyn, NY	MAJ J. J. Greene	Apr 89
464 CHEM BDE Johnstown, PA		
800 MP BDE Hempstead, NY		
804 HOSP CTR Bedford, MA		
2290 ARMY HOSP Rockville, MD		
Second Army		
3 TRANS BDE, Anniston, AL	MAJ L. K. Mason	Aug 90
87 MAN AREA CMD Birmingham, AL	MAJ M. E. Sparkman	Oct 89
143 TRANS CMD Orlando, FL	LTC B. C. Starling	Jul 90
332 MED BDE Nashville, TN		
335 SIG CMD East Point, GA		
412 ENGR BDE Vicksburg, MS	LTC W. M. Bost, Jr.	Jul 90
415 CHEM BDE Greenville, SC		
818 HOSP CTR Forest Park, GA		
7581 USAG San Juan, PR	LTC E. A. Gonzalez	Sep 89
Fourth Army		
21 SPT CMD, Indianapolis, IN	MAJ C. H. Criss	Apr 91
30 HOSP CTR Ft Sheridan, IL	MAJ J. F. Locallo, Jr.	Nov 88
103 COSCOM Des Moines, IA	LTC T. S. Reavely	Jun 91
205 INF BDE Ft Snelling, MN		
300 MP CMD Inkster, MI	LTC P. A. Kirchner	Jan 91
416 ENGR CMD (TDA AUG) Chicago, IL	COL W. G. Raysa	Oct 90
416 ENGR CMD Chicago, IL	COL R. G. Bernoski	Apr 90
425 TRANS BDE Ft Sheridan, IL	LTC S. K. Todd	(Ext) Feb 90
2291 ARMY HOSP Columbus, OH		
5501 ARMY HOSP Ft Snelling, MN		
Fifth Army		
75 MAN AREA CMD Houston, TX	LTC M. J. Thibodeaux	Jun 89
156 SPT GP Albuquerque, NM	LTC D. Williams	*
321 CA GP San Antonio, TX	COL O. Holden	*
326 SPT GP Kansas City, KS	MAJ M. B. Potter, Jr.	
377 TAACOM New Orleans, LA	LTC K. P. Sills	Sep 90
420 ENGR BDE Bryan, TX	MAJ T. Podbielski	Sep 87
460th CHEM BDE Jacksonville, AR		
807 MED BDE Seagoville, TX	LTC R. Eastburn, Jr.	Sep 89
ARPERCEN St. Louis, MO		
Sixth Army		
2 HOSP CTR Hamilton Field, CA		
221 MP BDE San Jose, CA		
311 COSCOM Los Angeles, CA	LTC J. C. Spence	Feb 89
319 TRANS BDE Oakland, CA		
351 CA CMD Mountain View, CA	MAJ G. J. LaFave	Apr 90
6253 US ARMY HOSP Novato, CA		

*No record of selection. Nominations due.

Automation of *The Army Lawyer*

The Judge Advocate General's School has begun to automate the editing and printing of *The Army Lawyer*. The successful execution of this plan will require the concerted effort and cooperation of all those who submit materials for publication in *The Army Lawyer*. Automation will greatly reduce the time required to prepare the issue for publication, and should virtually eliminate typesetting errors.

After 15 October 1988, authors must submit materials in two forms:

(1) 5¼" IBM compatible (MS–DOS) computer disc;

and

(2) "hard-copy" manuscript, preferably in letter quality print.

We have the capability of accepting text produced in the following formats:

(1) Enable version 2.15;

(2) WordPerfect version 4.2 or 5.0;

(3) DCA Revisable Form Text; and

(4) MultiMate.

If the author does not have access to any of the programs listed above, or to a program capable of converting a document into one of these forms (e.g., DisplayWrite 3 to DCA Revisable Form Text), the text should be submitted in ASCII format. If the author must convert the document to another format (to include DCA), both the original document and the converted document should be submitted.

To facilitate conversion of the text to a printer-ready format, a minimum of typeface codes should be used. Authors should not use special fonts, italics, bold, or upper and lower case capitals ("hi-lo" caps). Headings and subheadings should be in standard upper and lower case type, not in all upper case capitals. Endnotes, rather than footnotes, are preferred.

The disc should be labeled with the author's name and office, complete file name, word processing package used, the version of the program, and the format of the file if other than the word processor's (e.g., Revisable Form Text conversion from Enable 2.0 or DisplayWrite). The first page of the "hard-copy" should also contain this information.

For those individuals who are unable to submit material in any of the word processing formats listed above, the article or note must be submitted on plain white paper in *letter quality* text capable of being read by an optical character reader (OCR). There should not be any pen or pencil marks on the page. *All* "hard-copy" submissions must be double-spaced, typed or computer printed, with the endnotes on a separate page.

Authors must ensure that all submissions are checked for correct punctuation, spelling, and citation format. Articles should follow *A Uniform System of Citation* (14th ed. 1986), *Military Citation* (TJAGSA, July 1988), and the *Government Printing Office Style Manual* (1984).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 972–6307; commercial phone: (804) 972–6307).

2. Synopsis of the 2nd Advanced Installation Contracting Course (5F–F18), to be held 22–26 May 1989

The August 1988 edition of *The Army Lawyer* contained a message to the field that the 8th Commercial Activities Program (CAP) Course, which had been scheduled for 17–21 October 1988, has been cancelled, and that it would be combined with the 2nd Advanced Installation Contracting Course to be held on 22–26 May 1989. This is a follow up to that notice, in which we provide a synopsis of this combined course for your planning.

The purpose of the 2nd Advanced Installation Contracting Course is to provide advanced instruction in the legal aspects of government contracting at the installation level, to include the implementation of the Commercial Activities Program. Approximately half of the course will focus upon some of the more difficult problems that attorneys may encounter in dealing with the CAP, although some of these areas may also have application to installation contracting in general. We will discuss the following CAP subject areas: CAP policy, contract types, performance work statements, state taxation issues, cost comparisons, protests, appeals and litigation, federal employee rights, labor relations, and contract administration. By May 1989 a new OMB Circular A–76 should be published, along with a revised AR 5–20 and the new DA Pam 5–20, so there are likely to be many changes in these areas.

The remainder of the course will focus on more advanced contracting issues that contract attorneys likely would encounter at the installation level. Although subject to change, we are planning to cover the following subject areas: responsibility determinations, the integrity of the bidding system, current negotiation issues, bankruptcy, environmental law, review of claims, automatic data processing equipment contracting, multiple award schedule contracts, construction funding, payment and collection issues, and nonappropriated fund contracting.

Rather than the traditional lecture format, we will present most classes in a manner to generate class discussion and problem solving. The Contract Law Division at TJAGSA believes that this method of instruction will be the most beneficial to the more experienced installation contract attorney.

We invite your input for this combined course. You may telephone or write to the Contract Law Division if you have suggestions for other class topics or if you have any questions.

3. TJAGSA CLE Course Schedule

1988

October 4–7: 1988 JAG's Annual CLE Training Program

~~October 17–21: 8th Commercial Activities Program Course (5F–F16).~~ CANCELLED

October 17–December 21: 117th Basic Course (5–27–C20).

October 24–28: 21st Criminal Trial Advocacy Course (5F–F32).

October 31–November 4: 96th Senior Officers Legal Orientation (5F–F1).

October 31–November 4: 40th Law of War Workshop (5F–F42).

November 7–10: 2d Procurement Fraud Course (5F–F36).

November 14–18: 27th Fiscal Law Course (5F–F12).

November 28–December 2: 23rd Legal Assistance Course (5F–F23).

December 5–9: 4th Judge Advocate & Military Operations Seminar (5F–F47).

December 12–16: 34th Federal Labor Relations Course (5F–F22).

1989

January 9–13: 1989 Government Contract Law Symposium (5F–F11).

January 17–March 24: 118th Basic Course (5–27–C20).

January 30–February 3: 97th Senior Officers Legal Orientation (5F–F1).

February 6–10: 22d Criminal Trial Advocacy Course (5F–F32).

February 13–17: 2d Program Managers' Attorneys Course (5F–F19).

February 27–March 10: 117th Contract Attorneys Course (5F–F10).

March 13–17: 41st Law of War Workshop (5F–F42).

March 13–17: 13th Admin Law for Military Installations Course (5F–F24).

March 27–31: 24th Legal Assistance Course (5F–F23).

April 3–7: 5th Judge Advocate & Military Operations Seminar (5F–F47).

April 3–7: 4th Advanced Acquisition Course (5F–F17).

April 11–14: JA Reserve Component Workshop.

April 17–21: 98th Senior Officers Legal Orientation (5F–F1).

April 24–28: 7th Federal Litigation Course (5F–F29).

May 1–12: 118th Contract Attorneys Course (5F–F10).

May 15–19: 35th Federal Labor Relations Course (5F–F22).

May 22–26: 2d Advanced Installation Contracting Course (5F–F18).

May 22–June 9: 32d Military Judge Course (5F–F33).

June 5–9: 99th Senior Officers Legal Orientation (5F–F1).

June 12–16: 19th Staff Judge Advocate Course (5F–F52).

June 12–16: 5th SJA Spouses' Course.

June 12–16: 28th Fiscal Law Course (5F–F12).

June 19–30: JATT Team Training.

June 19–30: JAOAC (Phase II).

July 10–14: U.S. Army Claims Service Training Seminar.

July 12–14: 20th Methods of Instruction Course.

July 17–19: Professional Recruiting Training Seminar.

July 17–21: 42d Law of War Workshop (5F–F42).

July 24–August 4: 119th Contract Attorneys Course (5F–F10).

July 24–September 27: 119th Basic Course (5–27–C20).

July 31–May 18, 1990: 38th Graduate Course (5–27–C22).

August 7–11: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).

August 14–18: 13th Criminal Law New Developments Course, (5F–F35).

September 11–15: 7th Contract Claims, Litigation and Remedies Course (5F–F13).

4. Civilian Sponsored CLE Courses

December 1988

1–2: PLI, Managing the Corporate Law Department, New York, NY.

1–2: PLI Securities Filings: Review and Update, New York, NY.

1–2: PLI, Litigating Copyright, Trademark and Unfair Competition, Los Angeles, CA.

1–2: PLI, The Basics of Bankruptcy and Reorganization, New York, NY.

1–2: PLI, Advanced Antitrust, New York, NY.

1–3: ALIABA, Hazardous Wastes, Superfund, and Toxic Substances, Washington, D.C.

1–3: ALIABA, Advanced Employment Law and Litigation, Washington, D.C.

1–3: ALIABA, Fundamentals of Bankruptcy Law, Scottsdale, AZ.

2–7: NJC, Alcohol, Drugs and the Courts, Reno, NV.

3–4: MLI, Soft Tissue Injuries and Disability, Phoenix, AZ.

4–9: NJC, Traffic Court Proceedings, Reno, NV.

4–9: AAJE, Search and Seizure and the Law of Hearsay, New Orleans, LA.

5: NKU, DUI and Substance Abuse, Highland Hts., KY.

5–6: PLI, Managing the Medium-Sized Firm, San Francisco, CA.

5–6: PLI, Advanced Strategies in Employment Law, New York, NY.

5–6: PLI, Managing the Small Law Firm, San Francisco, CA.

5–7: GCP, Patents, Technical Data and Computer Software, Washington, D.C.

6–9: ESI, Operating Practices in Contract Administration, Washington, D.C.

8–9: PLI, Telecommunications, Washington, D.C.

8–9: PLI, Toxic Torts, San Francisco, CA.

8–9: PLI, Current Problems in Federal Civil Practice, New York, NY.

8–9: SLF, Institute on Patent Law, Dallas, TX.

9–10: PLI, Trial Evidence, New York, NY.

9–10: UKCL, Wills and Trusts, Lexington, KY.

10–11: MLI, How to Read and Effectively Use Medical Records and Reports, Orlando, FL.

12–13: PLI, Impact of Environmental Regulations on Business Transactions, New York, NY.

13–16: ESI, Operating Practices in Contract Administration, San Jose, CA.

15–16: PLI, The Basics of Bankruptcy and Reorganization, San Francisco, CA.

17–18: MLI, Neurological Injury and Disability, Las Vegas, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1988 issue of *The Army Lawyer*.

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1988 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Material Available Through the Defense Technical Information Center.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pps).
AD B116097	Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054	Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).

AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016	Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 40–657	Veterinary/Medical Food Inspection and Laboratory Service		19 Jul 88
AR 60–10	Army and Air Force Exchange Service General Policies		17 Jun 88
AR 70–35	Research, Development, and Acquisition		17 Jun 88
DA Pam 25–30	Index of Army Pubs and Blank Forms		Mar 88
DA Pam 360–422	A Pocket Guide to Germany		1987
DA Pam 360–611	Renting In the Civilian Community		Rev. 1987
JFTR Vol. 1	Joint Federal Travel Regulations	19	1 Jul 88
UPDATE 14	Message Address Directory	14	29 Jun 88

3. Articles

The following civilian law review articles may be of some use to judge advocates in performing their duties.

Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 Wm. Mitchell L. Rev. 337 (1988).

Bachmann, *The Politics of the First Amendment*, 6 Cardozo Arts & Entertainment L.J. 327 (1988).

Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 Ad. L. Rev. 209 (1988).

Currie, *The Constitution in the Supreme Court: Civil Rights and Liberties, 1930–1941*, 1987 Duke L.J. 800.

Day, *The Incidental Regulation of Free Speech*, 42 U. Miami L. Rev. 491 (1988).

Erler, *The Fourteenth Amendment and the Protection of Minority Rights*, 1987 B.Y.U. L. Rev. 977 (1988).

Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. Rev. 1173 (1987).

Heshizer, Muczyck, *Drug Testing at the Workplace: Balancing Individual, Organizational, and Societal Rights*, 39 Lab. L.J. 342 (June 1988).

Ireland, *Insanity and the Unwritten Law*, 32 Am. J. Legal Hist. 157 (1988).

Reynolds, *Constitutional Education*, 1987 B.Y.U. L. Rev. 1023.

Tripp, Herz, *Wetland Preservation and Restoration: Changing Federal Priorities*, 7 Va. J. Nat. Resources L. 221 (1988).

Weeks, *Public Employee Drug Testing Under the Fourth and Fifth Amendments: Where Are We Now and Where Are We Going Under Federal Decisions?*, 20 Urb. Law. 445 (1988).

*U.S. G.P.O. 1988-201-420:80373

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

WILLIAM J. MEEHAN II
Brigadier General, United States Army
The Adjutant General

Distribution. Special.

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Official Business
Penalty for Private Use $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287